No. 93-7407-CFH
Status: GRANTED

Title: Robert O'Neal, Petitioner
v.
Fred McAninch, Warden

Docketed:
January 3, 1994

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Wetterer,Thomas R.

Counsel for respondent: Cole,Stuart A.

Entry	Date	Note	Proceedings and Orders
1	Jan 3 1994	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jan 21 1994		Waiver of right of respondent Morris, Warden to respond filed.
4	Jan 27 1994		DISTRIBUTED. February 18, 1994 (Page 34)
5	Feb 1 1994	P	Response requested -- DHS. (Due March 1, 1994)
6	Feb 23 1994		Brief of respondent Fred McAninch, Warden in opposition filed.
7	Mar 3 1994		REDISTRIBUTED. March 18, 1994 (Page 21)
9	Mar 21 1994		REDISTRIBUTED. March 25, 1994 (Page 14)
11	Mar 28 1994		REDISTRIBUTED. April 1, 1994 (Page 12)
13	Apr 4 1994		Petition GRANTED. limited to Question 2 presented by the petition.
			**********
14	Apr 19 1994	G	Motion of petitioner for appointment of counsel filed.
15	Apr 25 1994		DISTRIBUTED. April 29, 1994 (Page 15)
16	May 2 1994		Motion for appointment of counsel GRANTED and it is ordered that Thomas R. Wetterer, Jr., Esquire, of Columbus, Ohio, is appointed to serve as counsel for the petitioner in this case.
18	May 17 1994		Order extending time to file brief of petitioner on the merits until June 2, 1994.
20	May 19 1994		Joint appendix filed.
19	May 20 1994		Brief amici curiae of American Civil Liberties Union, et al. filed.
21	May 24 1994		Brief amici curiae of National and Ohio Associations of Criminal Defense Lawyers filed.
22	Jun 2 1994		Brief amicus curiae of Timothy Scott Sherman filed.
23	Jun 2 1994		Brief of petitioner Robert O'Neal filed.
24	Jun 17 1994	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
25	Jun 27 1994		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
27	Jun 28 1994		Order extending time to file brief of respondent on the merits until July 15, 1994.
28	Jul 1 1994		Brief amicus curiae of United States filed.
29	Jul 15 1994		Brief amici curiae of Maryland, et al. filed.
30	Jul 15 1994		Brief of respondent Fred McAninch filed.
31	Aug 9 1994		CIRCULATED.
32	Aug 17 1994		SET FOR ARGUMENT MONDAY, OCTOBER 31, 1994. (3RD CASE).

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Entry	Date	Note	Proceedings and Orders
34	Aug 22 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Sixth Circuit.
33	Aug 24 1994	X	Reply brief of petitioner filed.
35	Sep 7 1994		Record filed.
		*	Original record proceedings United States District Court for the Southern District of Ohio (BOX)
36	Oct 27 1994		Letter from counsel for the petitioner citing additionalauthority received and distributed.
37	Oct 28 1994		Letter from counsel for the Respondent received and distributed.
38	Oct 31 1994		ARGUED.

ORIGINAL

93-7407

No. _____

Supreme Court, U.S.
FILED
JAN 3 1994
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROBERT O'NEAL,

Petitioner,

v.

TERRY L. MORRIS, WARDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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143 pp

QUESTIONS PRESENTED FOR REVIEW

I.

WHEN THE STATE COURT DID NOT HAVE AN OPPORTUNITY TO REVIEW THE IMPACT OF AN ERROR, AND THE FEDERAL HABEAS COURT IS THE FIRST COURT TO REVIEW THE CONSTITUTIONAL ERROR, DOES THE COURT APPLY THE CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967) OR BRECHT V. ABRAHAMSON, 113 S.CT. 1710 (1993) HARMLESS ERROR STANDARD?

II.

DOES THE STATE HAVE THE BURDEN OF PROVING A CONSTITUTIONAL ERROR TO BE HARMLESS UNDER BRECHT V. ABRAHAMSON, 113 S.CT. 1710 (1993)?

III.

DOES IT VIOLATE DUE PROCESS TO APPLY LOCKHART V. FRETWELL, 113 S.CT. 838 (1993) RETROACTIVELY TO A CASE PENDING ON REVIEW IN WHICH A WRIT WAS GRANTED UNDER THE THEN APPROPRIATE CONSTITUTIONAL STANDARD AND THE PETITIONER IN RELIANCE OF TEAGUE V. LANE, 489 U.S. 288 (1989) DID NOT CROSS APPEAL THE DENIAL OF OTHER CONSTITUTIONAL CLAIMS?

IV.

MUST A COURT COLLECTIVELY EVALUATE THE IMPACT OF DEFECTIVE JURY INSTRUCTIONS ON INTENT, PROSECUTORIAL MISCONDUCT, AND THE ADMISSION OF ERRONEOUSLY ADMITTED EVIDENCE IN DETERMINING WHETHER OR NOT A PETITIONER WAS DEPRIVED OF A FAIR TRIAL?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROBERT O'NEAL,

Petitioner,

v.

TERRY L. MORRIS, WARDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The petitioner, Robert O'Neal, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on August 20, 1993.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported and is reproduced in the Appendix to this petition at A-1. The entry of the Court of Appeals denying rehearing and rehearing **en banc** is reproduced at A-8.

The judgment of the United States District Court for the Southern District of Ohio, Western Division, is unreported but is reproduced at A-9. The opinion of the district court is

unreported but is reproduced at A-10. The Magistrate's Supplemental Report and Recommendation is unreported but is reproduced at A-14. The district court's original remand order is unreported, but reproduced at A-23. The Magistrate's Report and Recommendation is unreported, but reproduced at A-28.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 20, 1993. The order of the Court of Appeals denying petitioner's petition for rehearing and suggestion rehearing **en banc** was entered on October 4, 1993. This petition is timely filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case also involves the Fourteenth Amendment to the Constitution of the United States which provides in pertinent part:

FOURTEENTH AMENDMENT

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *

STATEMENT OF THE CASE

STATE COURT PROCEEDINGS

The incident underlying the indictment in this case involved the kidnapping, aggravated robbery and aggravated murder of Henry Podborny and the underlying conspiracy to commit those acts. Six people were indicted by the Cuyahoga County, Ohio Grand Jury for Aggravated Murder, Aggravated Robbery, and Kidnapping. The individuals were: (1) Lola Gail Toney, who conceived the whole plan and was convicted of all charges on July 17, 1981 (she testified for the State in this case); (2) Gary Gabbard -- Mrs. Toney's brother -- who was also convicted on July 17, 1981; (3) Lee Waress who pleaded guilty only to conspiracy to kidnap (he testified in this case pursuant to a defense subpoena); (4) Dimple Podborny (now deceased) who was Gail Toney's mother-in-law and was Henry Podborny's wife (she was convicted in this case); (5) Lloyd Allen was convicted in this case; and (6) Robert O'Neal, Petitioner, was convicted in this case. A seventh person, James McClean, who was involved in this scenario with Gail Toney from the beginning, escaped similar indictments by becoming an F.B.I. informant. McClean testified for the State in this case pursuant to an agreement with the F.B.I. and United States Attorney whereby he pleaded guilty to interstate transportation of stolen checks and no further state or federal charges would be placed against him (Tr. p. 3236).

The case started when Gail Toney conspired with others (not Petitioner) to extort money from Dimple Podborny, under the guise they were protecting Dimple from her husband. Later the goal of

the conspiracy changed to kidnapping Henry Podborny and holding him while his property was looted. Later the goal was to have Mr. Podborny declared incompetent so that his wife could assume legal control over his property. Unfortunately, Mr. Podborny was killed. The jury was presented with conflicting evidence of who killed Mr. Podborny. That mystery remains.

The State's circumstantial case against Petitioner relied heavily on Gail Toney's testimony. Gail Toney had already been convicted and was testifying pursuant to a plea agreement with the State (Tr. p. 1631). The other conspirators were told about Petitioner by Gail Toney, O'Neal was not part of their discussions (Tr. pp. 2062, 2065, 2071, 3069, 3222-23, 3232, 5173-5239). James McLean testified that he had seen Toney with a .38 revolver (Tr. p. 3219). Henry Podborny arrived in Cleveland on January 29, 1981, and disappeared. McLean also testified that on January 29, 1981 at 11:30 p.m., Gail Toney called McLean and told him that she and Gary Gabbard had grabbed Henry Podborny, tied him up, and taken his property. No mention was made of Petitioner (Tr. pp. 3227-3230). Toney made up Petitioner's involvement to justify keeping a larger part of the stolen money from the others. Petitioner denied any involvement (Tr. p. 4868). Allen also denied any involvement (Tr. p. 4961). The State also relied on Wilbur Higgins' testimony, despite the fact that a federal evidentiary hearing has demonstrated that Higgins lied (Doc. 60). The trial court record also supported a finding that Petitioner is factually innocent of the charges. The jury had to weigh the evidence and make factual findings. The

physical evidence was consistent with the possibility that Gail Toney killed Henry Podborny, and that Petitioner was not involved in the conspiracy.

Petitioner unsuccessfully appealed his conviction to the Ohio Court of Appeals and the Ohio Supreme Court.

FEDERAL HABEAS CORPUS PROCEEDINGS

In 1986, Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. Section 2254. The case was assigned to a Magistrate Judge. The Magistrate Judge held two hearings on this case, an oral argument, and an evidentiary hearing.

On January 22, 1992, the Magistrate Judge issued his Report and Recommendation and recommended that some claims warranted a new trial. The Magistrate Judge found that Petitioner's constitutional rights were not violated when Petitioner was tried jointly, and denied the right to cross examine a F.B.I. agent. The Magistrate Judge also ruled that Petitioner's challenge to the racial composition of the jury had factual support, but lacked merit since **Batson v. Kentucky**, 476 U.S. 79 (1986) was not to be applied retroactively. The Magistrate Judge found the jury instructions on intent were constitutionally defective, and that prosecutorial misconduct and erroneously admitted evidence deprived Petitioner of a fundamental fair trial. A new trial was recommended.

The District Court remanded the case to the Magistrate Judge for further review on the jury instruction issue. The Magistrate Judge completed the review and issued a Supplemental Report and Recommendation reaffirming that a new trial was mandated. The District Court adopted both reports and ordered a new trial.

The State appealed to the Sixth Circuit Court of Appeals and obtained a stay. During the pending of the State's appeal, this Court issued decisions in **Brecht v. Abrahamson**, 113 S.Ct. 1710 (1993), and **Lockhart v. Fretwell**, 113 S.Ct. 838 (1993).

The Sixth Circuit Court of Appeals found that the constitutional and nonconstitutional error findings made by the lower courts were correct, however, the court found that these errors were harmless under **Brecht** and Petitioner was not deprived of a fair trial. **O'Neal v. Morris**, 3 F.3d 143 (6th Cir. 1993). Petitioner filed a timely Petition for Rehearing with Suggestion for **En Banc** Rehearing. Petitioner based that motion on the basis that the court's decision was erroneous and conflicted with other Sixth Circuit decisions and opinions from other Federal Circuits.

A timely petition is made to this Court.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT NEEDS TO RESOLVE THE CONFLICT BETWEEN THE DECISIONS OF THE FOURTH, SIXTH, EIGHTH, AND ELEVENTH CIRCUIT COURTS OF APPEALS ON THE ISSUE OF WHAT HARMLESS ERROR STANDARD OF REVIEW IS TO BE APPLIED WHEN THE STATE COURT DID NOT REVIEW THE IMPACT OF THE ERROR AND THE FEDERAL COURT IS FIRST TO REVIEW THE CONSTITUTIONAL ERROR.

There is currently a conflict between the Federal Circuit Court of Appeals on whether or not the **Brecht v. Abrahamson**, 113 S.Ct. 1710 (1993) or **Chapman v. California**, 386 U.S. 18 (1967) harmless error standard is to be applied in federal habeas review when the Petitioner did not receive the benefit of the lower **Chapman** standard in state court proceedings.

Without directly addressing the issues, several Federal Circuit Courts of Appeals who have applied the **Brecht** standard when the state court failed to recognize constitutional error and evaluate the error impact on the record. Petitioner's court has applied this higher standard despite the fact that Petitioner's case was never reviewed under the **Chapman** standard in state court proceedings. **O'Neal v. Morris**, 3 F.3d 143, 145 (6th Cir. 1993); **Cumbie v. Singletary**, 991 F.2d 715, 724 (11th Cir. 1993). These cases have applied the **Brecht** standard despite the fact that those petitioners never received the lower standard of review in state court proceedings.

The Eighth Circuit Court of Appeals has found that the **Brecht** rule does not apply under these circumstances:

> We believe the **Brecht** rule is based largely on the notion that because the state courts can properly apply the **Chapman** harmless error standard on direct review, the federal habeas courts need only review those decisions under the **Kotteakos** harmless error standard. In the case before us, however, the state courts did not have the opportunity to review the error at all, and the federal habeas court was the first court to review the constitutional error under the **Chapman** harmless error standard. As a result, we find that rule announced in **Brecht** does not apply and that the **Chapman** harmless error standard is the appropriate test in this case.

Orndorff v. Lockhart, 998 F.2d 1426, 1430 (8th Cir. 1993). The Fourth Circuit Court of Appeals has not addressed the issue directly, but does recognize the inherent conflict with the **Brecht** standard:

> The **Brecht** court held that constitutional errors of the "trial" type are subject to a lower standard of harmless-error analysis on

> federal habeas review (error must not cause "actual prejudice," **see Kotteakos v. United States**, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)) than on direct appeal (error must be harmless beyond a reasonable doubt, **see Chapman v. California**, 386 U.S. 18, 24, 87 S.Ct. 824, 838, 17 L.Ed.2d 705 (1967)). **Brecht**, ___ U.S. at ___, 113 S.Ct. at 1721-22. Thus, **Brecht** created the following anomaly: If a state court conducts harmless-error review of a constitutional error, the defendant has the advantage of the State having to prove harmlessness beyond a reasonable doubt. If, however, the state court does not discover the error (as here), or does not review it for harmlessness (as here), the defendant is handicapped, since, on federal habeas review, the State has only to establish that the error did not "substantially prejudice" the jury's decision. **See id.** at ___, 113 S.Ct. at 1725 (White, J., dissenting)(explaining the "illogically disparate treatment" caused by **Brecht**).

Smith v. Dixon, 996 F.3d 667, 676 n. 13 (4th Cir. 1993). The **Dixon** court did not apply the **Brecht** or **Chapman** Standard, the court remanded the case to the state court for the **Chapman** analysis.

In view of the conflict between the Federal Circuit Courts of Appeals, this Court should grant certiorari and decide this important constitutional issue.

II.

THIS COURT NEEDS TO RESOLVE THE CONFLICT BETWEEN THE DECISIONS OF THE FOURTH, FIFTH, SIXTH, SEVENTH, NINTH, AND ELEVENTH CIRCUIT COURT OF APPEALS ON WHO HAS THE BURDEN OF PROVING A CONSTITUTIONAL ERROR TO BE HARMLESS UNDER BRECHT V. ABRAHAMSON, 113 S.CT. 1710 (1993).

There is currently a conflict between the Federal Circuit Courts of Appeals on who has the burden of proving that a constitutional error was harmless under **Brecht v. Abrahamson**, 113

S.Ct. 1710 (1993). In Petitioner's case, the burden was placed on the defendant to prove that the constitutional error was not harmless, while other Federal Court of Appeals have placed the burden on the state. **O'Neal v. Morris**, 3 F.3d 143, 145 (6th Cir. 1993).

Several Federal Circuit Court of Appeals that have placed the burden of proving the error not to be harmless on the petitioner. **O'Neal v. Morris**, 3 F.3d 143, 145 (6th Cir. 1993); **Kyles v. Whitley**, 5 F.3d 806, 818 (5th Cir. 1993); **Tague v. Richards**, 3 F.3d 1133, 1140 (7th Cir. 1993); and **Henry v. Estelle**, 993 F.2d 1423, 1427 (9th Cir. 1993); **Cumbie v. Singletary**, 991 F.2d 715, 724 (11th Cir. 1993).

Other panels within some of the same Federal Circuit Courts of Appeals have placed the burden on the state to prove the constitutional error harmless under the **Brecht** standard. **Lowery v. Collins**, 996 F.2d 770, 773 (5th Cir. 1993); **Stoner v. Sowders**, 997 F.2d 209, 213 (6th Cir. 1993); **Sherman v. Smith**, 8 F.3d 820 (4th Cir. 1993) (unpublished 1992 WL 433317). **Lowery** and **Stoner** both rely on Justice Stevens' concurring opinion for placing the burden upon the state for proving harmless error. **Brecht v. Abrahamson**, 113 S.Ct. at 1723-24 (Stevens, J., concurring).

There is a split of opinions on the placement of the burden of proof under **Brecht** in determining harmlessness. In view of this conflict between the Federal Circuit Courts of Appeals, this Court should grant certiorari and decide this important constitutional issue.

III.

IT DOES VIOLATE DUE PROCESS TO APPLY LOCKHART V. FRETWELL, 113, S.CT. 838 (1993) RETROACTIVELY TO A CASE PENDING ON REVIEW IN WHICH A WRIT WAS GRANTED UNDER THE THEN APPROPRIATE CONSTITUTIONAL STANDARD AND THE PETITIONER IN RELIANCE OF TEAGUE V. LANE, 489 U.S. 288 (1989) DID NOT CROSS APPEAL THE DENIAL OF OTHER CONSTITUTIONAL CLAIMS.

The appellate court in Petitioner's case found that the district court applied the wrong standard of review when determining the jury instruction error. **O'Neal v. Morris**, 3 F.3d 143, 145 (6th Cir. 1993). In fact, the district court did apply the appropriate standard, since it was obligated to apply the law as it existed when Petitioner's conviction became final. See **Teague v. Lane**, 489 U.S. 288 (1989). That standard was changed in **Lockhart v. Fretwell** 113 S.Ct. 838, 844 (1993). **Fretwell** was decided while O'Neal's case was pending in the Sixth Circuit Court of Appeals; therefore, the district court did use the then proper standard. The appellate court is obligated to review cases and not to resolve disputed facts. The appellate court should have either remanded the case under **Fretwell** or reviewed the district court decision under the then appropriate standard of **Francis v. Franklin**, 471 U.S. 307, 315-16 (1985). To apply **Fretwell** retroactively to Petitioner's case, while on appeal, violates "petitioner's reliance on past judicial precedent" since Petitioner relied on the district court findings and did not file a cross appeal in this case on other constitutional claims that were denied. See **Fretwell**, 113 S.Ct. at 844. To apply **Fretwell** retroactively to Petitioner in this manner violates Petitioner's due process right.

This Court should grant certiorari and address the important constitutional issue.

IV.

PETITIONER WAS DEPRIVED OF A FAIR TRIAL BY THE COLLECTIVE IMPACT OF DEFECTIVE JURY INSTRUCTIONS ON INTENT, PROSECUTORIAL MISCONDUCT, AND THE ADMISSION OF PREJUDICIAL ERRONEOUSLY ADMITTED EVIDENCE.

Magistrate Judge Steinberg found the combined effects of the errors created a "structural" error:

> The obvious purpose and the likely result of such inflammatory evidence and improper arguments was to cause the jury to abandon its impartiality in weighing the evidence. Added to that are the confusing jury instructions and the improper prosecution argument concerning them, which could have led a reasonable juror to conclude that O'Neal could be convicted of each crime absent specific intent. Furthermore, although the Supreme Court has foreclosed this issue as an independent ground for constitutional error, it is important to note that O'Neal was intentionally deprived of the presence of any juror of his race to deliberate his fate.
>
> Following the mechanical approach to [**Arizona v.**] **Fulminate** [, 111 S.Ct. 1246 (1991)] of dividing fair trial issues into two exclusive categories, we believe the circumstances outlined above created a "structural defect" in the trial. To paraphrase the Court in **Fulminante**, in the absence of an impartial jury, "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" 111 S.Ct. at 1265, quoting **Rose v. Clark**, 478 U.S. 570, 577-78 (1986).

O'Neal v. Morris, Magistrate Report and Recommendation p. 43 (doc. 68) A-71.

The Sixth Circuit Court of Appeals failed to review the constitutional violations collectively. **O'Neal v. Morris**, 3 F.3d

143, 147-148 (6th Cir. 1993). A collective review would have demonstrated that a "structural defect" occurred at Petitioner's trial and he is entitled to a new trial. See **Sullivan v. Louisiana** 113 S.Ct. 2078, 2083-84 (1993).

The **Brecht-Kotteakos** harmless error rule applies to many constitutional trial errors identified in federal habeas corpus proceedings, but not all. It does not, for one, apply to errors involving prosecutorial misconduct. The Court said in **Brecht** that the **Brecht-Kotteakos** rule does not apply to "a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct." **Brecht**, 113 S.Ct. at 1722 n.9. Under these circumstances, a rule of automatic reversal must be used or a review for collective impact must be made of the record. This exception exists in order to ensure that state prosecutors will not be tempted to deliberately violate a defendant's constitutional rights in the belief that any such violation will be held harmless.

The Sixth Circuit Court of Appeals' decision affirmed the district court finding that prosecutorial misconduct occurred at Petitioner's state trial. **O'Neal v. Morris**, 3 F.3d at 148. The Sixth Circuit Court of Appeals failed to consider the state courts' behavior as required by **Brecht-Kotteakos**. The district court, however, had evaluated the impact of the prosecutorial misconduct:

> In any event, assuming **arguendo**, that the jury instructions were not constitutionally defective, we would still recommend a finding that O'Neal was deprived of a fair trial based on the prosecutor's misconduct and the erroneously admitted evidence. We view the prosecutor's misconduct and the admission of inflammatory evidence as far more egregious errors than the confusing jury instructions. As we stated in the previous report and recommendation, "[w]e seriously doubt that O'Neal could have received a fair trial in the emotional atmosphere created by the introduction of unnecessary and gruesome evidence; the evidence of a prior killing committed by O'Neal where the victim was shot in the head; the prosecutor's inflammatory argument designed to stir the passions of the jurors; and the effective endorsement of such actions by the trial judge through his overruling defense objections, failing to weigh the prejudice of such evidence, and failing to give prompt cautionary instructions." (doc. 68, p. 42).
>
> The prosecutor's improper conduct in eliciting the details of O'Neal's killing another man was calculated, highly prejudicial and extensive. See **id.** at 30-39. The introduction of gruesome evidence, coupled with the prosecutor's inflammatory remarks regarding such evidence, was also prejudicial and was done for the express purpose of inflaming the jury's passions. See **id.** 28-30, 39-40. It is likely that these errors, which were effectively endorsed by the trial judge, caused the jury to abandon its impartiality in weighing the evidence. Although the evidence against O'Neal was substantial, it was not overwhelming and there were substantial credibility issues for the jury to resolve. **Id.** at 47-48. Accordingly, we conclude that the prosecutor's misconduct and the erroneous admission of inflammatory evidence, taken as a whole and within the context of the entire record, deprived O'Neal of a fundamentally fair trial.

O'Neal v. Morris, Supplemental Magistrate Report and Recommendation pp. 7-8. (doc. 74) A-21-22.[1]

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[1] In **McKinney v. Rees**, 993 F.2d 1378 (9th Cir. 1993) the Ninth Circuit Court of Appeals found a violation of due process under **Brecht** on only the admission of irrelevant evidence and improper use of character evidence. In O'Neal's case that error was combined with defective jury instructions and prosecutorial misconduct.

In his concurring opinion in **Greer v. Miller**, 483 U.S. 756 (1987), upon which the Court relied in **Brecht**, **see** 113 S.Ct. at 1722 n. 9, Justice Stevens identified another situation in which harmless error analysis does not apply. In addition to instances involving prosecutorial misconduct or a pattern of such conduct, there may be an instance in which the error complained of "is **combined with other errors** . . . [such] that the integrity of the proceeding is called into question." **Greer**, 483 U.S. at 769 (Stevens, J., concurring in judgment) (emphasis added). Such cumulative error is not only a well-recognized basis for habeas corpus relief, **see, e.g., Derden v. McNeel**, 978 F.2d 1453, 1456-59 (5th Cir. 1992) (en banc); **Lundy v. Campbell**, 888 F.2d 467, 481 (6th Cir. 1989), **cert. denied**, 495 U.S. 950 (1990); **Bell v. Duckworth**, 861 F.2d 169, 170 (7th Cir. 1988), **cert. denied**, 489 U.S. 1088 (1989), it is also resistant to harmless error analysis.

When a trial is tainted by a number of discrete trial errors it may be practically impossible -- as it is with so-called "structural errors" -- to evaluate the combined impact with any degree of confidence, even if the impact of any single error could be. At some point the number of errors is so great and their effects so interrelated that any attempt to separate them would be sheer guesswork and would "defy analysis by 'harmless-error' standards." **See Pulminante**, 111 S.Ct. at 1265. Magistrate Judge Steinberg applied **Lundy** to O'Neal's facts and found that the cumulative errors warranted a new trial. Magistrate's Report and Recommendation pp. 41,49 (doc. 68). The

Sixth Circuit Court of Appeals failed to review O'Neal's case under the cumulative error standard.

This Court should grant certiorari and determine the merits of this constitutional claim.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5(b), Rules of the Supreme Court, I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was forwarded by regular U.S. Mail to Suzanne Mohr, Assistant Attorney General and Lee I. Fisher, Ohio Attorney General at their offices at 30 East Broad Street, Columbus, Ohio 43266-0410, on this 3rd day of January, 1994. I further certify that all parties required to be served have been served.

THOMAS R. WETTERER, JR.
Assistant State Public Defender
Counsel of Record

COUNSEL FOR PETITIONER

und that pharmacists generally
to warn customers when their
scr e the wrong medication,
s ague that the duty owed by
generally was not the issue in
ath the district court should
w ther Eckerd in particular,
s advertising or other conduct,
greater duty to warn than is
ed y other pharmacists. We
k moved for summary judg-
claims asserted in Wimm and
am ded complaint, which made
f a advertising campaign or of
duty which Eckerd might have
allegations were made for the
th plaintiffs' second amended
hic the district court did not
filed. As a result, those allega
e before the district court,
ic court was not required to
n in ruling on Eckerd's motion
judgment.

III

re ng reasons, we AFFIRM.

KEY NUMBER SYSTEM

nt unnecessary, those negotiations
la Podlesnick's hesitancy in seek-
m 1.). Wimm and Speer's expla-
ir ay in asserting these claims is

l urt found that Wimm and
st amendment would have been
"the amount of cough syrup given
a[d] been thoroughly investigated
rm ation made that [he] did not
ic se of the cough syrup." Be-
irm the district court's denial of
peer's motion on other grounds, we
id whether the proposed amend-
av een futile. We note, however,
ct urt's underlying assumption—
liscovery would not have revealed
m a toxic dose of cough syrup—
te y the record.

Robert O'NEAL, Petitioner-Appellee,

v.

Terry L. MORRIS, Respondent-Appellant.

No. 92-3763.

United States Court of Appeals, Sixth Circuit.

Argued May 6, 1993.

Decided Aug. 20, 1993.

Rehearing and Suggestion for Rehearing En Banc Denied Oct. 4, 1993.

State prisoner convicted of aggravated murder, aggravated robbery, and kidnapping petitioned for writ of habeas corpus. The United States District Court for the Southern District of Ohio, Herman J. Weber, J., granted the writ, and state appealed. The Court of Appeals, Alan E. Norris, Circuit Judge, held that: (1) state's failure to file timely objections to magistrate's first report did not preclude its appeal, and (2) any error in jury instructions and prosecutor's closing argument pertaining to intent of conspirators or aiders and abettors was harmless, where all evidence upon which jury could have relied to establish petitioner's guilt pointed to his guilt as a principal.

Reversed.

1. United States Magistrates ⇐25

Rule that party's failure to file timely objections to magistrate's report waives party's right to appeal is procedural, not jurisdictional, and Court of Appeals may excuse default in interests of justice. 28 U.S.C.A. § 636(b)(1).

2. United States Magistrates ⇐25

Rule that failure to file timely objections to magistrate's report waives right to appeal would not be applied to preclude state's appeal in habeas corpus case in which state's objections to magistrate's first report were filed approximately 20 days late, where court recommitted case to magistrate who issued second report, and state filed timely objections to second report, which district court considered. 28 U.S.C.A. § 636(b)(1).

3. Homicide ⇐305

Jury instructions in aggravated murder prosecution did not deprive defendant of a fair trial on ground they improperly suggested he could be convicted of offense as an aider and abettor or conspirator even if only his codefendants, and not defendant himself, possessed requisite intent to kill; court's reference to "defendants or codefendants or aiders and abettors" reminded jury that they could find that defendant had the intent to kill as a defendant or codefendant or as an aider and abettor; moreover, court stressed at least twice that jurors should separately consider elements applicable to each defendant as if he or she were separately tried.

4. Habeas Corpus ⇐497

Even if prosecutor's improper suggestion that prosecution need not make an independent showing of intent as to each defendant in order for conspiracy liability to attach, in conjunction with confusion engendered by court's instructions on mens rea, abridged defendant's constitutional rights in aggravated murder prosecution, defendant was not prejudiced; although defendant argued that instructions permitted jury to find him guilty as an accomplice or conspirator by imputing to him intent of principals, all evidence which jury could have relied to establish defendant's guilt pointed to his guilt as a principal.

Thomas R. Wetterer, Jr. (argued & briefed), Public Defender's Office, Columbus, OH, for petitioner-appellee.

Suzanne E. Mohr (argued & briefed), Office of the Atty. Gen. of Ohio, Columbus, OH, for respondent-appellant.

Before: MILBURN, RYAN, and NORRIS, Circuit Judges.

ALAN E. NORRIS, Circuit Judge.

The state of Ohio, on behalf of warden Terry L. Morris of the Chillicothe Correctional Institute, appeals the district court's order which conditionally granted a writ of habeas corpus on the basis that improper jury instructions and other trial errors ren-

dered petitioner Robert O'Neal's state murder trial fundamentally unfair. We reverse.

I.

In 1981 petitioner was convicted by an Ohio jury of aggravated murder, aggravated robbery, and kidnapping in connection with the death of Henry Podborny. In January 1981 Podborny's estranged wife, Dimple, lured him from his home near Chicago on the pretense that she wished to resolve their marital difficulties. Three months later, authorities discovered Mr. Podborny's corpse in a field in Cleveland.

The evidence at trial revealed a detailed conspiracy among at least six individuals, including Dimple Podborny, her daughter-in-law, and acquaintances, to kidnap, rob, and murder Henry Podborny. The conspirators considered a number of plots, but eventually decided to have Dimple induce her husband to fly to Cleveland. Petitioner would then kidnap and hold him in the basement of an unlicensed saloon petitioner operated, while others would rob Mr. Podborny's residence and business.

On January 29, 1981, Mr. Podborny flew to the Cleveland airport, where Dimple's daughter-in-law, Lola Toney, met him and escorted him to petitioner's saloon. Minutes after Mr. Podborny entered, petitioner exited the bar and handed to Toney Podborny's wallet and other possessions. Soon after, another conspirator, Lloyd Allen, emerged from the bar and informed petitioner and Toney that he had struck Podborny with a pipe.

From January through March, Dimple, Toney, and others engaged in a variety of schemes to make it appear that Mr. Podborny was traveling on business, while they attempted to obtain his money. By late March, Toney believed Henry Podborny was no longer alive. His corpse was discovered a month later. Coroners determined that he had been struck at least five times in the head and shot once in the forehead. Petitioner, Dimple Podborny, Lola Toney, Lloyd Allen, and two others were subsequently indicted for aggravated murder, aggravated robbery, and kidnapping. After the case against three of the conspirators was resolved by a trial and a guilty plea, petitioner, Lloyd Allen, and Dimple Podborny were tried jointly and convicted on all counts. Petitioner unsuccessfully appealed his conviction to the Ohio Court of Appeals and Ohio Supreme Court.

In 1986, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court ruled that petitioner's trial had been fundamentally unfair and conditionally granted the writ. The state filed this timely appeal.

II.

Petitioner first argues that this court should not hear the state's appeal because the state's objections to the magistrate's first report, which recommended that the writ issue, were filed approximately twenty days late. *See* 28 U.S.C. § 636(b)(1) (setting ten-day deadline for objections to magistrate's report). This court held in *United States v. Walters*, 638 F.2d 947 (6th Cir.1981), that a party's failure to file timely objections to a magistrate's report waives that party's right to appeal from the district court's decision to adopt the magistrate's report. *Id.* at 949–50. *See also Thomas v. Arn*, 474 U.S. 140, 142, 106 S.Ct. 466, 468, 88 L.Ed.2d 435 (1985) (approving *Walters* rule).

While the district court agreed to strike the state's untimely objections, it declined to adopt the magistrate's entire report. Instead, the court recommitted the case to the magistrate for further consideration. After reconsideration, the magistrate issued a second report, again recommending that the court grant the writ and incorporating much of the reasoning articulated in the first report. The state filed timely objections to the second report, which the district court considered.

[1, 2] It is well established that the *Walters* rule is procedural, not jurisdictional, and that this court may excuse the default in the interests of justice. *Thomas*, 474 U.S. at 155, 106 S.Ct. at 475; *Kent v. Johnson*, 821 F.2d 1220, 1222–23 (6th Cir.), *amended on other grounds* (6th Cir.1987). This court has also concluded that when, as here, a district court considers untimely objections, the justi-

[illegible] a trial and a guilty plea, petitioner, [illegible] Allen, and Dimple Podborny were [illegible]y and convicted on all counts. Pe[illegible] successfully appealed his convic[illegible]e Ohio Court of Appeals and Ohio [illegible]me Court.

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fications for enforcing the *Walters* rule dissipate. *Patterson v. Mintzes*, 717 F.2d 284, 286 (6th Cir.1983). Therefore, given the unique facts of this case, we conclude it is in the interests of justice to hear the state's appeal of the district court's decision that the writ be granted.

III.

In *Brecht v. Abrahamson*, — U.S. —, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), the Supreme Court recently clarified the standard we must apply on habeas review of state court convictions. If we conclude that a federal constitutional trial error[1] occurred at petitioner's trial, we must ascertain whether the error " 'had substantial and injurious effect or influence in determining the jury's verdict' " such that it resulted in actual prejudice. *Brecht*, — U.S. at —, —, 113 S.Ct. at 1717, 1722 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)). The habeas petitioner bears the burden of establishing such prejudice. *Id.*, — U.S. at —, 113 S.Ct. at 1722.

In petitioner's case, the district court adopted the magistrate's conclusion that the jury instructions given at petitioner's trial "were so confusing and vague that a reasonable juror could have interpreted them to mean that the intent of one co-conspirator could be imputed to [petitioner]," thereby relieving the state of its burden to prove petitioner's intent to kill beyond a reasonable doubt, in violation of *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), and *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

Initially, we point out that the district court employed an outdated standard for evaluating petitioner's *Sandstrom* claim. The court incorrectly relied upon the test espoused in *Francis v. Franklin*, 471 U.S. 307, 315–16, 105 S.Ct. 1965, 1972, 85 L.Ed.2d 344 (1985), and *Sandstrom*, 442 U.S. at 514, 99 S.Ct. at 2454, and followed by this court in *Clark v. Jago*, 676 F.2d 1099, 1102 (6th Cir. 1982), *cert. denied*, 466 U.S. 977, 104 S.Ct. 2360, 80 L.Ed.2d 832 (1984), that jury instructions infringe a defendant's due process rights if a reasonable jury *could have* interpreted the instruction as unconstitutionally shifting the burden of proof. However, after reviewing its sometimes inconsistent articulations of the test, the Supreme Court settled on a single standard of review for jury instructions: " 'whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, — U.S. —, — & n. 4, 112 S.Ct. 475, 482 & n. 4, 116 L.Ed.2d 385 (1991) (emphasis added) (quoting *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1197, 108 L.Ed.2d 316 (1990)).

[3] With this standard, we turn to the instructions at issue here. Petitioner was charged with aggravated murder, aggravated robbery, and kidnapping. Under Ohio law, a court may instruct the jury on complicity even though the defendant was charged as a principal. *See* Ohio Rev.Code Ann. § 2923.03(A), (F) (Anderson 1993); *Hill v. Perini*, 788 F.2d 406, 407–08 (6th Cir.) (discussing the practice and holding that it does not violate a defendant's right to notice of the charges against him or her), *cert. denied*, 479 U.S. 934, 107 S.Ct. 409, 93 L.Ed.2d 361 (1986). Thus, in petitioner's case, the district court charged the jury that it could find petitioner guilty as a principal, as a coconspirator, or as an aider and abettor.

Charging a defendant as a conspirator or aider and abettor does not, however, alter the government's responsibility to establish intent to kill. Ohio law on complicity pro-

1. A constitutional trial error is one which "occurs during the presentation of the case to the jury, and is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial." *Id.*, — U.S. at —, 113 S.Ct. at 1717 (alterations in original) (citing *Arizona v. Fulminante*, — U.S. —, —, 111 S.Ct. 1246, 1249, 113 L.Ed.2d 302 (1991)). Such errors contrast with "structural defects in the constitution of the trial mechanism," such as deprivation of the right to counsel, which require automatic reversal because "they infect the entire trial process." *Id.* The Supreme Court recently noted that jury instruction errors quite similar to that alleged here, involving presumptions about an element of the offense, are amenable to harmless-error review. *See Sullivan v. Louisiana*, — U.S. —, —, 113 S.Ct. 2078, 2082, 124 L.Ed.2d 182 (1993).

dered petitioner Robert O'Neal's state murder trial fundamentally unfair. We reverse.

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vides that for a defendant to be convicted as an aider or abettor or conspirator, he or she must possess "the kind of culpability required for commission of [the principal] offense," here, a purpose to kill. Ohio Rev. Code Ann. §§ 2923.03(A)(2)-(3), 2903.01(A). In other words, Ohio does not adhere to the strict felony-murder rule. *State v. Lockett*, 49 Ohio St.2d 48, 358 N.E.2d 1062, 1070 (1976), *rev'd on other grounds sub nom. Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Nevertheless, Ohio courts permit a jury to infer an aider and abettor's intent to kill when

> the facts show that the participants in a felony entered into a common design and *either* the aider or abettor knew that an inherently dangerous instrumentality was to be employed to accomplish the felony *or* the felony and the manner of its accomplishment would be reasonably likely to produce death.

State v. Scott, 61 Ohio St.2d 155, 400 N.E.2d 375, 382 (1980) (citing *Lockett*, 358 N.E.2d at syllabus ¶¶ 3–4).

Petitioner contends that in attempting to explain these principles of Ohio law, the trial court's instructions unreasonably confused the jury. The court charged that

> [p]urpose to kill is an element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendants *or co-defendants or aiders and abettors*, if you so find, a specific intention to kill the decedent Henry Podborny.

(Emphasis added.) Similar instructions were read concerning the intent elements of aggravated robbery and kidnapping. The district court ruled that these instructions deprived petitioner of a fair trial because they improperly suggested that he could be convicted of these offenses as an aider and abettor or conspirator even if only his codefendants, and not petitioner himself, possessed the requisite intent to kill.

However, when read against the backdrop of Ohio complicity law, the court's reference to "defendants or co-defendants or aiders and abettors" appears to be nothing more than an unartful boilerplate reiteration that the same individuals could be found guilty *either* as principals ("defendants or co-defendants") or as "aiders and abettors." *See Hill*, 788 F.2d at 407–08. The phrase did not instruct the jury that it could convict petitioner by finding intent to kill in his codefendants or aiders and abettors; rather, it reminded the jury that they could find that petitioner had intent to kill as a defendant *or* a codefendant *or* an aider and abettor. This reading is supported by the fact that the challenged phrase follows close on the heels of the court's unequivocal statement that "[p]urpose to kill is an element of the crime of aggravated murder." Furthermore, in its instructions, the court stressed at least twice that the jurors "must separately consider the elements applicable to each of the defendants as [if] he or she were separately tried" and not allow their conclusions about one defendant to influence the verdict as to the other defendants.

Moreover, elsewhere in his charge, the trial judge stated:

> The Court in order to assist you understand [sic] the element of purpose and purposely herein, wherein the evidence discloses an existence of complicity by way of aider and abettor and conspiracy, the Court instructs you, as I stated in the law of Ohio as follows: When you have an unlawful act being contemplated in an original conspiracy such as a kidnapping, stealing and so forth, although not identical with or similar to criminal acts charged, if the defendants conspired to commit the unlawful act in the manner in which it was performed *would reasonably and likely produce* the death of another, then each conspirator is equally guilty as the principal offender of the homicide although such conspirator, or person, or defendant, aider and abettor was neither present or had knowledge of the physical killing or the weapon used.

(Emphasis added.) While this instruction also was not ideal, it captured the essence of how a jury might properly infer an aider and

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abettor or conspirator's purpose to kill as explained by the Ohio Supreme Court. *See Scott*, 400 N.E.2d at 382; *Lockett*, 358 N.E.2d at syllabus ¶¶ 3–4. Accordingly, we conclude that petitioner has not demonstrated a reasonable likelihood that the jury interpreted the instructions, taken as a whole, to permit petitioner's conviction without proof that he himself had the requisite intent to kill.[2]

[4] Petitioner suggests, however, that the prosecutor's closing argument compounded the potential for jury confusion. The prosecutor informed the jury that to obtain a conviction on a conspiracy theory in Ohio,

> [t]he State is bound to prove to a jury two things. First, that the crimes alleged have been committed.... The next thing we're bound to prove to you is that those accused of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes.

The trial court overruled defense counsel's objection to this misstatement of Ohio law. We agree that this improperly suggested that the prosecution need not make an independent showing of intent as to each defendant in order for conspiracy liability to attach.

Nevertheless, even if this remark, in conjunction with any confusion engendered by the court's instructions on mens rea, could be said to have abridged petitioner's constitutional rights, we conclude that these errors were not of such magnitude that they "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, — U.S. at —, 113 S.Ct. at 1722. Petitioner argues that the instructions permitted the jury to find him guilty as an accomplice or conspirator by imputing to him the intent of the principals. However, all of the evidence upon which the jury could have relied to establish petitioner's guilt pointed to his guilt as a principal.[3] Petitioner and Lloyd Allen were in petitioner's bar when Henry Podborny entered, and petitioner exited his establishment with Podborny's wallet and other possessions just minutes later. One witness testified that petitioner had told him that he and Allen had killed a man and placed his body in the field next to the witness' home, where Podborny's corpse was in fact discovered. In addition, physical evidence admitted at trial tended to show that Podborny was killed in petitioner's bar. Authorities found blood of Podborny's type spattered on the walls of petitioner's saloon and discovered paint on Podborny's body that was similar to the paint in the bar. Finally, the prosecutor consistently portrayed petitioner to the jury as a principal. Consequently, any error by the trial court pertaining to the intent of conspirators or aiders and abettors did not injuriously influence the jury's decision to convict petitioner as a principal.

2. We recognize that in *Clark v. Jago*, 676 F.2d 1099 (6th Cir.1982), this court overturned an Ohio aggravated murder conviction for *Sandstrom* error in instructions that bear some similarity to those given here. *Clark*, however, is both distinguishable on the facts and outdated as a matter of law. In this case, unlike *Clark*, the jury charge provided an adequate statement of the way an aider and abettor's intent may be inferred in Ohio. *See Clark*, 676 F.2d at 1105 (noting that court failed to provide this mechanism to the jury). In addition, the court in *Clark* had charged that defendant "and/or his accomplice" must possess the requisite intent to kill. *Id.* Such an instruction more clearly suggests that intent by only one of the two would suffice for conviction of both defendants. In contrast, the court's reference in petitioner's case to "defendants or co-defendants or aiders and abettors" more likely indicates that the court was merely using three different labels for all three defendants as a group. Any implication that each of the three defendants need not possess the required mens rea is much weaker. However, even if we deemed these factual distinctions insignificant, the legal standards upon which *Clark* based its holding have been superseded by more recent Supreme Court decisions, which have changed both the general standard for habeas review of constitutional trial errors, *Brecht*, — U.S. at —, 113 S.Ct. at 1722, as well as the specific test for constitutional errors in jury instructions. *Estelle*, — U.S. at — & n. 4, 112 S.Ct. at 482 & n. 4. *Clark* therefore provides no support for petitioner's claim.

3. The court's instructions on defendant's liability as a principal clearly required the jury to find that "the killing was done purposely and ... with prior calculation and design."

IV.

The district court also held that several rulings of the trial court on the admission of prejudicial evidence, together with the prosecutor's inflammatory closing remarks, deprived petitioner of a fundamentally fair trial. After a careful review of the record, we conclude that these errors were not of constitutional dimension, but were at most errors in the application of state law. As the decisions of both the Supreme Court and this circuit make clear, "federal habeas corpus relief does not lie for errors of state law" because "it is not the province of a federal habeas court to reexamine state court determinations on state law questions." *E.g., Estelle*, — U.S. at —, 112 S.Ct. at 480; *Walker v. Engle*, 703 F.2d 959, 962 (6th Cir.), *cert. denied*, 464 U.S. 951, 104 S.Ct. 367, 78 L.Ed.2d 327 (1983). Under federal constitutional standards, the trial court's evidentiary rulings and the prosecutor's comments were not so prejudicial, either individually or in combination, that they rendered petitioner's trial fundamentally unfair.

V.

For the foregoing reasons, we **reverse** the judgment of the district court conditionally granting the writ of habeas corpus.

Harry E. FLEISCHHAUER; Louis B. Updegrove; Roger Houston; Bruce I. Forrester; Kathleen D. Forrester; Robert P. Gill; Daniel E. Wright; Carol A. Wright; Gordon M. Earle; Ref Productions, Ltd.; Dennis M. Harrington; Charles Mueller; C.T. Lee; James Ralph; Natividad M. Aumentado; David Forrester; Robert Mournighan; Ona L. Mournighan; Joseph Reisinger; Ken W. Chambers; Charles E. Judd, d/b/a C.E. Judd & Associates, Plaintiffs–Appellants,

v.

C. Elvin FELTNER, Jr.; Palm Beach Properties, Inc., a/k/a Palm Beach Films, Inc.; Metropolitan Properties, Inc., a/k/a Metropolitan Films, Inc.; Robert J. Levine; C.E. Feltner, Jr., d/b/a Fleischhauer, et al. v. Feltner, et al. Metropolitan Films, Inc., Defendants–Appellees.

Nos. 92-3337, 92-3461 and 92-3775.

United States Court of Appeals, Sixth Circuit.

Argued June 10, 1993.

Decided Aug. 20, 1993.

Action was brought under Racketeer Influenced and Corrupt Organizations Act (RICO). After being awarded sizeable verdict, plaintiff sought attorney fees. The United States District Court for the Southern District of Ohio, Carl B. Rubin, J., awarded fees, and plaintiffs appealed. The Court of Appeals, Wellford, Senior District Judge, held that: (1) supplemental fee application filed after date specified for filings could be disregarded; (2) attorney fees could be denied for time spent by attorney who failed to inform district court that he had been disbarred; (3) hourly rate of $150 was within district court's discretion; and (4) reduction of fees for unsuccessful claims was within district court's discretion.

Affirmed.

1. Federal Civil Procedure ⇐2742.5

District court's order requiring that all documents pertaining to attorney fees should be filed by specific date, rather than within specific number of days, was neither invalidated nor extended by reason of fact that date specified fell on Saturday; computation under Federal Rules of Civil Procedure, and

No. 92-3763

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

OCT 04 1993

LEONARD GREEN, Clerk

ROBERT O'NEAL,

Petitioner-Appellee,

v.

TERRY L. MORRIS, SUPT.,

Respondent-Appellant.

ORDER

BEFORE: MILBURN, RYAN, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green
Leonard Green, Clerk pe

United States District Court

SOUTHERN DISTRICT OF OHIO

ROBERT O'NEAL

V.

TERRY MORRIS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C-1-86-976

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

(1) Petitioner's motion for bail and suspension of execution of sentence (doc. no. 72) is **DENIED**.

(2) Petitioner's application for a writ of habeas corpus (doc. no. 1) is **CONDITIONALLY GRANTED**. The State of Ohio or the County of Cuyahoga should retry petitioner within ninety (90) days from the date of this Order. Should no further action be taken by the State of Ohio or the County of Cuyahoga, within ninety (90) days of the date of this Order, including retrial of petitioner, the Court **ORDERS** respondent to release petitioner, such release being final and unconditional.

This case is DISMISSED and TERMINATED on the docket of this Court.

Judge 4845
Misc. 4847
Journal
Motion #
Issue CM 72
Card
N/S
Docketed

July 27, 1992
Date

KENNETH J. MURPHY
Clerk

(By) Deputy Clerk D. A. Myers

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KENNETH J. MURPHY
CLERK

Jun 26 9 59 AM '92

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,

Petitioner

v. C-1-86-976

TERRY MORRIS,

Respondent

Judge 481
Mag. 481C
Journal
Motion #
Issue Clm
Card
N/S
Docketed

ORDER

Petitioner Robert O'Neal brings this action through court-appointed counsel for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner challenges the constitutionality of his convictions by a jury in the Cuyahoga County, Ohio Court of Common Pleas for aggravated murder, kidnapping, and aggravated robbery. This matter is before the Court upon a Report and Recommendation and a Supplemental Report and Recommendation of the United States Magistrate Judge (doc. nos. 68, 74), respondent's objection (doc. no. 76), petitioner's response (doc. no. 79), petitioner's motion for bail (doc. no. 72), and a pretrial services report (doc. no. 77).

I.

The Magistrate Judge recommends that this Court issue a writ of habeas corpus on the ground that O'Neal was not provided a fundamentally fair trial due to the constitutionally defective jury

instructions, the prosecutor's prejudicial misconduct, and the admission of certain prejudicial evidence.[1]

Upon a *de novo* review of the record in light of respondent's objections, the Court finds that respondent's contentions have either been adequately addressed and properly disposed of by the Magistrate Judge or present no particularized arguments that warrant specific responses by this Court. The Court finds that the Magistrate Judge accurately set forth the controlling principles of law and properly applied them to the particular facts of this case and agrees with the Magistrate Judge that petitioner was deprived of a fundamentally fair trial in violation of his rights under the Due Process Clause.

Accordingly, the Court hereby **ADOPTS** the Report and Recommendation and the Supplemental Report and Recommendation of the United States Magistrate Judge (doc. nos. 68, 74).

II.

Petitioner seeks an order directing the state to release him on bail and suspend the execution of his sentence (doc. no. 72). He argues that release on bail is proper because the violations of

[1] The Magistrate Judge also recommends that in the event this Court does not adopt these recommendations, this Court should grant a writ of habeas corpus on petitioner's claim that he was deprived of his rights under the Due Process Clause during his state appeal of his convictions. Given this Court's agreement with the Magistrate Judge's primary conclusions, there is no need to reach petitioner's claim that he was deprived of due process during his state appeal.

his constitutional rights during his trial are substantial meritorious claims of law that warrant a new trial. Petitioner asserts that the following exceptional circumstances justify release on bail: He is sixty-one years of age; he has served over eleven years on the sentences imposed in this case; he filed the present habeas corpus action over five and one-half years ago; he is factually innocent of the crimes, as demonstrated by the trial record and as supported by certain testimony during the evidentiary hearing held by the Magistrate Judge; he has substantial business and family ties to the Cleveland area, and; he has numerous friends in Cleveland.

Respondent, remarkably, has not filed a response to petitioner's motion for bail.

The factors pertinent to determining whether a successful habeas corpus petitioner is entitled to bail or bond pending appeal are set forth in ***Workman v. Tate***, 958 F.2d 164, 166 (6th Cir. 1992); ***see also*** Fed. R. App. P. 23. Weighing the factors in light of the specific circumstances of this case, this Court finds that petitioner's release on bail is not warranted at this time. The factors weighing against releasing petitioner on bond pending his appeal include the fact that petitioner has placed himself in positions where acts of violence have occurred, he stands accused of committing three violent felony offenses upon which there exists "substantial" evidence (doc. no. 68, p. 47) of his guilt, the Federal Pretrial Services Report recommends that his motion for bond be denied, and the State of Ohio's interest in continuing

petitioner's rehabilitation and ensuring public safety. ***See Workman***, 958 F.2d at 166. Since these significant factors outweigh the harm petitioner may incur by remaining incarcerated pending his new trial, his motion for bail is not well taken at this time. ***Cf. id.***

ORDER

This Court hereby **ORDERS** that:

(1) Petitioner's motion for bail and suspension of execution of sentence (doc. no. 72) is **DENIED**.

(2) Petitioner's application for a writ of habeas corpus (doc. no. 1) is **CONDITIONALLY GRANTED**. The State of Ohio or the County of Cuyahoga should retry petitioner within ninety (90) days from the date of this Order. Should no further action be taken by the State of Ohio or the County of Cuyahoga, within ninety (90) days of the date of this Order, including retrial of petitioner, the Court **ORDERS** respondent to release petitioner, such release being final and unconditional.

IT IS SO ORDERED.

Herman J. Weber, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,

Petitioner,

vs. CASE NO. C-1-86-0976

TERRY MORRIS,

Respondent

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NOTICE

Attached hereto is the Supplemental Report and Recommended Decision of the Honorable Robert A. Steinberg, United States Magistrate Judge, which was filed on May 11, 1992. Any party may object to the Magistrate Judge's findings, recommendations and report within ten (10) days after being served with a copy thereof or further appeal is waived. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Such parties shall file with the Clerk of Court, and serve on all parties, the Judge and the Magistrate Judge, a written Motion to Review which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made, along with a memorandum of law setting forth the basis for such objection. (Such parties shall file with the Clerk a transcript of the specific portions of any evidentiary proceedings to which an objection is made).

In the event a party files a Motion to Review the Magistrate Judge's Findings, Recommendations and Report, all other parties shall respond to said Motion to Review within ten (10) days after being served a copy thereof.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,
Petitioner

vs Case No. C-1-86-0976

TERRY MORRIS,
Respondent

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SUPPLEMENTAL REPORT AND RECOMMENDATION

Petititoner Robert O'Neal, a prisoner at the Chillicothe Correctional Institute in Chillicothe, Ohio, filed this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On January 22, 1992, we issued a report and recommendation recommending that the petition be denied with respect to two of O'Neal's claims for habeas corpus relief and granted with respect to his claims that jury instructions were constitutionally defective and that prosecutorial misconduct and erroneously admitted evidence deprived him of a fundamentally fair trial. (Doc. 68).

On April 15, 1992, the district court judge issued an order adopting the portion of the report and recommendation recommending denial of two of O'Neal's claims for habeas corpus relief. (Doc. 73). The Court also adopted our conclusion that "petitioner's convictions are supported by substantial but not overwhelming evidence." *Id.* at 2. However, the

Court ordered the petition recommitted to the undersigned Magistrate Judge for reconsideration of O'Neal's claims of constitutionally defective jury instructions and that he was deprived of a fair trial because of prosecutorial misconduct and erroneously admitted evidence "in light of the doctrine espoused in *Pinkerton v. United States,* 328 U.S. 640, 645-48 (1946), and the cases spawned by it as they may relate to these claims." *Id.* The Court further stated:

> The Court incorporates herein by reference § 3.10, Pattern Criminal Jury Instructions of the Sixth Circuit (1991) and the commentary thereunder. . . . This Court holds that these federal instructions fulfill the requirements of federal due process. The theory of law they represent may impact upon the conclusion of the Report and Recommendation, because the Magistrate Judge found in the record substantial evidence supporting the guilt of the petitioner.

Id. at 2-3.

The *Pinkerton* doctrine relates to O'Neal's claim that the jury instructions were constitutionally defective because they relieved the State of its burden of proving beyond a reasonable doubt the intent element for each offense charged. In our previous report and recommendation, we found that the instructions were confusing because they failed to set forth the state law requirement that each defendant have the independent intent to commit the offenses charged in order to be found guilty. (Doc. 68, p. 21). We concluded that the erroneous instructions constituted a due process violation because a reasonable juror could have interpreted them to mean that a finding of intent on the part of one co-conspirator would be sufficient to establish the requisite intent of other participants in the alleged conspiracy. *Id.* at 24.

In *Pinkerton,* the Supreme Court held that a defendant can be convicted of the substantive offenses charged against him, even though there is no evidence to show that he participated directly in the

commission of the offenses, if it is found that he was a party to an unlawful conspiracy at the time the offenses were committed and the offenses charged were in fact committed in furtherance of the conspiracy. 328 U.S. at 645-47. The Court reasoned:

> Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy. Yet all members are responsible, though only one did the mailing. The governing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project. The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle.

Id. at 647 (citations omitted). The Court refused to extend its holding to situations where the substantive offense committed by a co-conspirator "was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Id.* at 647-48.

Section 3.10 of the Sixth Circuit's Pattern Criminal Jury Instructions is based on the *Pinkerton* case. Under this section, a defendant can be found guilty of substantive offenses committed by others if the government proves beyond a reasonable doubt that the defendant was a member of an unlawful conspiracy; that while he was a member of the conspiracy, one or more of the other members

committed the substantive offense; that the offense was committed to help advance the conspiracy; and that the offense was within the reasonably foreseeable scope of the conspiracy. The instruction provides: "This does not require proof that each defendant specifically agreed or knew that the crime would be committed. But the government must prove that the crime was within the reasonable contemplation of the persons who participated in the conspiracy. No defendant is responsible for the acts of others that go beyond the fair scope of the agreement as the defendant understands it."

Under Ohio's complicity statute, which provides the statutory basis for the charges against O'Neal on the theory of his participation as an accomplice or co-conspirator, aiders and abettors and co-conspirators must have the culpable mental state required for the commission of the principal offense. Ohio Rev. Code § 2923.03(A); *see also State v. Lockett,* 49 Ohio St. 2d 48, 60 (1976), *rev'd on other grounds,* 438 U.S. 586 (1978). In Ohio, a defendant cannot be convicted of aggravated murder solely because he engaged in a felony that resulted in a murder; rather, the prosecution must prove a defendant's purpose to kill as an essential element of the offense even in cases where it proceeds on a complicity theory. *State v. Scott,* 61 Ohio St. 2d 155, 166 (1980); *see also Clark v. Jago,* 676 F.2d 1099, 1103-04 (6th Cir. 1982), *cert. denied,* 466 U.S. 977 (1984). The prosecution may prove intent to kill either by producing direct evidence of intent or by showing that the participants in a felony entered into a common plan and the aider and abettor or co-conspirator knew either that a dangerous instrumentality was to be employed to accomplish the felony or that the felony and the manner of its accomplishment was reasonably likely to produce death. *Scott,* 61 Ohio St. 2d at 165; *Lockett,* 49 Ohio St. 2d at 59-60. As in *Pinkerton,* this means that under Ohio law intent to kill can be inferred from the existence of a criminal conspiracy where a homicide could reasonably be foreseen as a natural consequence arising from the furtherance of the conspiracy. *See Lockett,* 49 Ohio St. 2d at 60-62. For example, evidence that a defendant participated in the planning and commission of an armed robbery, where it is reasonably foreseeable that the victim's life would be endangered, is sufficient to establish intent to kill. *Lockett,* 49 Ohio St. 2d at 62. On the other hand, a jury instruction which would permit a defendant to be found guilty of aiding and

abetting a murder solely based on evidence that he was implicated in the victim's kidnapping improperly relieves the State of its burden of proving intent to kill. *Scott,* 61 Ohio St. 2d at 166-67.

In this case, the jury instructions on the intent element of the offenses charged and the complicity theory of liability were so confusing and vague that a reasonable juror could have interpreted them to mean that the intent of one co-conspirator could be imputed to O'Neal as a participant in a conspiracy, even if the offense was not within the reasonably foreseeable scope of that conspiracy as required under *Pinkerton* and Ohio case law. In instructing the jury on the intent element of the substantive offenses of aggravated murder, kidnapping and aggravated robbery, the court often referred to "the defendants or co-conspirators or aiders and abettors" as a group, without explicitly setting forth the intent required of each defendant individually either as a direct participant in the offense or as a participant in a conspiracy. (*See* Doc. 68, App. A, pp. 2, 5, 8). In addition, the court never instructed the jury that in order to find the individual defendants guilty of the substantive offenses under a conspiracy or complicity theory, it had to find that the offenses could reasonably be foreseen as necessary or natural consequences of the conspiracy. *See id.* at 9, 14, 16. Indeed, the court instructed the jury on conspiracy and complicity only in general terms, without discussing the separate offenses charged or the scope of the conspiracy alleged against defendants. *See id.* at 8-16.

Therefore, without further explanation, a reasonable juror could have concluded that O'Neal could be found guilty of the crimes of kidnapping, robbery and murder simply based on his participation in a conspiracy to obtain money from either Mrs. or Mr. Podborny that eventually led to the commission of the offenses. Also, a reasonable juror could have interpreted the instructions to mean that if O'Neal were found to be a member of a kidnapping conspiracy, he could be found guilty of aggravated murder resulting from the kidnapping even if the murder was not within the reasonable contemplation of the participants in the kidnapping scheme. *Cf. Scott,* 61 Ohio St. 2d at 166-67.

The instructions as a whole were insufficient to dispel the possibility of juror confusion. When instructing on the intent element of

aggravated murder, the court stated on one occasion:

> Wherein the evidence may disclose the existence of complicity by way of an aider and abettor or a conspiracy, the law of the state of Ohio is as follows: . . . where you have an unlawful act contemplated in the original conspiracy, although not identical with or similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was performed was reasonable [sic] or likely to produce the death of another, then each conspirator, or aider and abettor is equally guilty as the principal offender of the homicide.

(Doc. 68, App. A, p. 2). This instruction, which was repeated to the jury when it requested a "brief definition of aggravated murder" during its deliberations, properly sets forth an appropriate method for inferring an accomplice's or co-conspirator's intent to kill based on his participation in a conspiracy. *See Scott*, 61 Ohio St. 2d at 165; *Lockett*, 49 Ohio St. 2d at 59-60.

However, no such instruction was given regarding the requisite intent of an accomplice or co-conspirator on the other charges of aggravated robbery and kidnapping. Moreover, the instruction was stated in pro-prosecution terms of a finding of a guilt. The court gave no further instructions to emphasize to the jury that before it could find the defendants guilty of aggravated murder based on their participation in a conspiracy, it had to find that the unlawful object of the conspiracy and the manner of its accomplishment was reasonably likely to produce death.

The instructions given on complicity and conspiracy further confused matters because the court never stated that the substantive offense had to be a reasonably foreseeable consequence of the conspiracy before the jury could find the defendants guilty of the offense solely because of their participation in the conspiracy. The court did not list

"reasonable foreseeability" as a condition for finding co-conspirator liability. (*See* Doc. 68, App. A, p. 9). Moreover, without mentioning the reasonable foreseeability component, the court stated: "Where two or more people enter into execution of a common criminal enterprise, what each does in the execution of the common purpose is the act of all, and if another crime is committed by one of them in attempting to accomplish the common criminal purpose, any one of them . . . is guilty of the crime with the one who did the act if such crime was committed to accomplish common criminal purpose during the -- in furtherance during the time of the conspiracy." *Id.* at 16. At one point in these instructions, the court made the vague statement that "[i]t is enough that the offense charged in the indictment was one that *might* have been contemplated as a result of the conspiracy." *Id.* at 15 (emphasis added).

As discussed in the previous report and recommendation, the risk that the jury could have wrongly interpreted the instructions on intent was substantially increased by the prosecutor's misstatement of the law in his closing remarks, which was effectively endorsed by the trial judge when he overruled defense counsel's objections to the remarks. (*See* Doc. 68, pp. 23-24). The prosecutor's comments improperly suggested to the jury that all that was necessary to establish guilt for the crimes charged was proof "that those accused of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes." (Tr. 6075-76).

Accordingly, the doctrine espoused in *Pinkerton* does not change our conclusion in the previous report and recommendation that the jury instructions on the intent element of the crimes charged constituted a violation of O'Neal's right to due process of law.

In any event, assuming, *arguendo*, that the jury instructions were not constitutionally defective, we would still recommend a finding that O'Neal was deprived of a fair trial based on the prosecutor's misconduct and the erroneously admitted evidence. We view the prosecutor's misconduct and the admission of inflammatory evidence as far more egregious errors than the confusing jury instructions. As we stated in the previous report and recommendation, "[w]e seriously doubt that O'Neal could have received a fair trial in the emotional atmosphere

created by the introduction of unnecessary and gruesome evidence; the evidence of a prior killing committed by O'Neal where the victim was shot in the head; the prosecutor's inflammatory argument designed to stir the passions of the jurors; and the effective endorsement of such actions by the trial judge through his overruling defense objections, failing to weigh the prejudice of such evidence, and failing to give prompt cautionary instructions." (Doc. 68, p. 42).

The prosecutor's improper conduct in eliciting the details of O'Neal's killing another man was calculated, highly prejudicial and extensive. *See id.* at 30-39. The introduction of gruesome evidence, coupled with the prosecutor's inflammatory remarks regarding such evidence, was also prejudicial and was done for the express purpose of inflaming the jury's passions. *See id.* at 28-30, 39-40. It is likely that these errors, which were effectively endorsed by the trial judge, caused the jury to abandon its impartiality in weighing the evidence. Although the evidence against O'Neal was substantial, it was not overwhelming and there were substantial credibility issues for the jury to resolve. *Id.* at 47-48. Accordingly, we conclude that the prosecutor's misconduct and the erroneous admission of inflammatory evidence, taken as a whole and within the context of the entire record, deprived O'Neal of a fundamentally fair trial.

Date: 5-8-92

cbc

Robert A. Steinberg
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
CLERK
Apr 15 10 15 AM '92

ROBERT O'NEAL,

Petitioner

v. C-1-86-976

TERRY L. MORRIS,

Respondent

ORDER

This matter was referred pursuant to 28 U.S.C. § 636 to the United States Magistrate Judge for Report and Recommendation on the Petition for Writ of Habeas Corpus filed by the petitioner pursuant to 28 U.S.C. § 2254. The matter is before the Court upon the Report and Recommendation of the Magistrate Judge (doc. no. 68) recommending that the Petition for Writ of Habeas Corpus be denied as to certain claims and granted as to certain claims; upon respondent's objections thereto (doc. no. 69), which were not timely filed; petitioner's Motion to Strike Objection (doc. no. 70); petitioner's response to respondent's objections (doc. no. 71); and petitioner's Motion for Bail and Suspension of Execution of Sentence (doc. no. 72).

The respondent failed to file his objections in a timely fashion and failed to serve the petitioner with a Motion for Extension to File Objections.

The respondent has not responded to the petitioner's Motion

to Strike the Objections of the Respondent.

Upon careful consideration of the matters before the Court, and upon conducting a *de novo* review of the record, the Court finds that the Magistrate Judge's conclusion that petitioner's convictions are supported by substantial but not overwhelming evidence should be adopted (doc. no. 68, p. 47).

Accordingly, the Court accepts the factual findings of the Magistrate Judge and hereby **ADOPTS IN PART AND INCORPORATES** into this Order by reference his Report and Recommendation dated January 22, 1992 that O'Neal's Petition for Writ of Habeas Corpus be **DENIED** as to the following:

(a) O'Neal's claim that he should not have been tried with his co-defendants;

(b) O'Neal's challenge to the racial composition of the jury.

As to O'Neal's Petition for Writ of Habeas Corpus based on the claim of constitutionally defective jury instructions and the claim that prosecutorial misconduct and erroneously admitted evidence deprived O'Neal of a fundamentally fair trial, the Petition for Writ of Habeas Corpus is **RECOMMITTED** to the Magistrate Judge for reconsideration in light of the doctrine espoused in *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946), and the cases spawned by it as they may relate to these claims. The Court incorporates herein by reference § 3.10, Pattern Criminal Jury Instructions of the Sixth Circuit (1991) and

the commentary thereunder, a copy of which is attached. This Court holds that these federal instructions fulfill the requirements of federal due process. The theory of law they represent may impact upon the conclusion of the Report and Recommendation, because the Magistrate Judge found in the record substantial evidence supporting the guilt of the petitioner.

In light of the above, the Court further **ORDERS** that petitioner's Motion for Bail and Suspension of Execution of Sentence (doc. no. 72) is **REFERRED** to the Magistrate Judge pursuant to Rule 10, Rules Governing Section 2254 Cases in the United States District Courts, and 28 U.S.C. § 636(b); and petitioner's Motion to Strike Objection (doc. no. 70) is **GRANTED**, since respondent failed to respond to the Motion to Strike, failed to file timely objections, and failed to file a timely motion for an extension of time in which to file objections to the Report and Recommendation.

IT IS SO ORDERED.

Herman J. Weber, Judge
United States District Court

3.10

PINKERTON LIABILITY FOR SUBSTANTIVE OFFENSES COMMITTED BY OTHERS

(1) Count ___ of the indictment accuses the defendants of committing the crime of _____.

(2) There are two ways that the government can prove the defendants guilty of this crime. The first is by convincing you that they personally committed or participated in this crime. The second is based on the legal rule that all members of a conspiracy are responsible for acts committed by the other members, as long as those acts are committed to help advance the conspiracy, and are within the reasonably foreseeable scope of the agreement.

(3) In other words, under certain circumstances, the act of one conspirator may be treated as the act of all. This means that all the conspirators may be convicted of a crime committed by only one of them, even though they did not all personally participate in that crime themselves.

(4) But for you to find any one of the defendants guilty of _____ based on this legal rule, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant was a member of the conspiracy charged in Count ___ of the indictment.

(B) Second, that after he joined the conspiracy, and while he was still a member of it, one or more of the other members committed the crime of _____.

(C) Third, that this crime was committed to help advance the conspiracy.

(D) And fourth, that this crime was within the reasonably foreseeable scope of the unlawful project. The crime must have been one that the defendant

could have reasonably anticipated as a necessary or natural consequence of the agreement.

(5) This does not require proof that each defendant specifically agreed or knew that the crime would be committed. But the government must prove that the crime was within the reasonable contemplation of the persons who participated in the conspiracy. No defendant is responsible for the acts of others that go beyond the fair scope of the agreement as the defendant understood it.

(6) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of them, then the legal rule that the act of one conspirator is the act of all would not apply.

Use Note

This instruction should be used when the government is attempting to convict a defendant of a substantive crime committed by other members of a conspiracy, and there is also some evidence that the defendant personally committed or participated in the commission of the substantive offense.

The language in paragraph (2) should be modified to delete all references to personal commission or participation when only one defendant is on trial and there is no evidence that he personally committed or participated in the commission of the substantive offense.

When more than one defendant is on trial, and there is no evidence that one or more defendants personally participated in the substantive offense, paragraph (2) should be modified to identify which defendants could be convicted on a personal participation theory, and which defendants could not.

Committee Commentary 3.10

This instruction is designed for use when there is some evidence that would support a conviction based on a co-conspirator liability theory, and some evidence that a defendant personally committed or participated in a substantive offense.

In *Pinkerton v. United States*, 328 U.S. 640, 645–648, 66 S.Ct. 1180, 1183–1185, 90 L.Ed. 1489 (1946), the Supreme Court held

that even though there was no evidence that one of two conspirators participated directly in the commission of the substantive offenses charged in the indictment, that conspirator could still be convicted of the substantive offenses based on the principle that the "act of one partner [committed in furtherance of the conspiracy] may be the act of all." Accord *United States v. Martin*, 920 F.2d 345, 348 (6th Cir.1990) ("The *Pinkerton* doctrine permits conviction of a conspirator for the substantive offenses of other conspirators committed during and in furtherance of the conspiracy."); *United States v. Adams*, 742 F.2d 927, 943–944 (6th Cir. 1984) ("Once a person becomes a member of a conspiracy, he or she may 'be held responsible for all that may be ... done' by co-conspirators."), cert. denied, 469 U.S. 1193, 105 S.Ct. 971, 83 L.Ed.2d 975 (1985); *United States v. Chambers*, 382 F.2d 910, 914 (6th Cir.1967)) ("Where the substantive offense is committed by one or more conspirators in furtherance of an unlawful activity, all members of the conspiracy are guilty of the substantive offense.").

The instruction requires the prosecution to prove that the substantive offense was committed after the defendant joined the conspiracy, and while he was still a member of it. Although there is some authority for the proposition that a person who joins a conspiracy may be held responsible for acts committed before he joined it, see, e.g., *United States v. Cimini*, 427 F.2d 129, 130 (6th Cir.), cert. denied, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970), that authority is questionable in light of the United States Supreme Court's decision in *Levine v. United States*, 383 U.S. 265, 266–267, 86 S.Ct. 925, 925–926 15 L.Ed.2d 737 (1966). In *Levine*, the Supreme Court accepted the Solicitor General's concession that an individual "cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy."

The Supreme Court has indicated that it would not hold co-conspirators liable for a substantive offense committed by other members of the conspiracy if the substantive offense "was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of ... the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Pinkerton*, *supra*, 328 U.S. at 647–648, 66 S.Ct. at 1184–1185. In *United States v. Etheridge*, 424 F.2d 951, 965 (6th Cir.1970), cert. denied, 400 U.S. 1000, 91 S.Ct. 464, 27 L.Ed.2d 462 (1971), the Sixth Circuit treated this statement from *Pinkerton* as creating three separate limita-

tions on the rule that the act of one co-conspirator is the act of all, and Instruction 3.10 does the same. *Cf. United States v. Frost*, 914 F.2d 756, 762 (6th Cir.1990) ("[A] court need not inquire into the individual culpability of a particular conspirator, so long as the substantive crime was a reasonably foreseeable consequence of the conspiracy.")

In *Pinkerton*, the Supreme Court stated that the act of one co-conspirator may be the act of all "without any new agreement specifically directed to that act." *Id.*, 328 U.S. at 646–647, 66 S.Ct. at 1183–1184. And in *Etheridge*, the Sixth Circuit held that even though a defendant had no knowledge of a particular substantive offense, he could still be convicted of that offense if it was "within the reasonable contemplation of those who formulated and participated" in the conspiracy. *Id.*, 424 F.2d at 965.

In *United States v. Borelli*, 336 F.2d 376, 385–386 (2d Cir. 1964), cert. denied, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965), the Second Circuit held that when the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance to the case, a special instruction should be given focusing the jury's attention on this issue. Quoting from *United States v. Peoni*, 100 F.2d 401, 403 (2d Cir.1938), the Second Circuit stated that "[n]obody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it". See also *United States v. United States Gypsum Co.*, 438 U.S. 422, 463 n. 36, 98 S.Ct. 2864, 2886 n. 36, 57 L.Ed.2d 854 (1978) (quoting a similar requested instruction, and stating that the district court's actual instructions differed in only "minor and immaterial" respects).

When only a single defendant is on trial and there is no evidence that he personally committed or participated in the commission of the substantive offense, the language in paragraph (2) should be modified to delete all references to personal commission or participation.

When more than one defendant is on trial, and there is no evidence that one or more defendants personally participated in the substantive offense, paragraph (2) should be modified to identify which defendants could be convicted on a personal participation theory, and which defendants could not.

JAMES M. MURPHY
CLERK

JAN 22 1 52 PM '92

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,

Petitioner,

vs. CASE NO. C-1-86-0976

TERRY MORRIS,

Respondent

Judge _____
Mag. _____
Journal ✓
Motion # _____
Issue _____
Card _____
N/S _____
Docketed _____

NOTICE

Attached hereto is the Report and Recommended Decision of the Honorable Robert A. Steinberg, United States Magistrate Judge, which was filed on January 22, 1992 Any party may object to the Magistrate Judge's findings, recommendations and report within ten (10) days after being served with a copy thereof or further appeal is waived. *See United States v. Walters,* 638 F.2d 947 (6th Cir. 1981). Such parties shall file with the Clerk of Court, and serve on all parties, the Judge and the Magistrate Judge, a written Motion to Review which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made, along with a memorandum of law setting forth the basis for such objection. (Such parties shall file with the Clerk a transcript of the specific portions of any evidentiary proceedings to which an objection is made).

In the event a party files a Motion to Review the Magistrate Judge's Findings, Recommendations and Report, all other parties shall respond to said Motion to Review within ten (10) days after being served a copy thereof.

JAMES M. MURPHY
CLERK

JAN 22 1 52 PM '92

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
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ROBERT O'NEAL,
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vs

Case No. C-1-86-0976

TERRY MORRIS,
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REPORT AND RECOMMENDATION

Petitioner Robert O'Neal, a prisoner at the Chillicothe Correctional Institute in Chillicothe, Ohio, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on the petition, the return of writ, the parties' submissions of exhibits and supplemental briefs, as well as evidence and legal arguments presented during two hearings. (Docs. 1, 10, 12, 14, 20, 22, 24, 25, 31, 34, 38, 41, 47, 49, 57, 58, 59, 63, 65, 67).

Procedural Background

On March 27, 1981, O'Neal and five others were indicted by the Cuyahoga County, Ohio grand jury on one count of aggravated murder as defined in Ohio Rev. Code § 2903.01, one count of kidnapping as defined in Ohio Rev. Code § 2905.01, and one count of aggravated robbery as defined in Ohio Rev. Code § 2911.01. (Doc. 10, Ex. B). On July 17, 1981, in a separate trial, a jury found two defendants, Lola Gail

Toney and Gary Gabbard, guilty as charged. *Id.*, Ex. E, p. 2; Tr. 1735; *see also Ohio v. Gabbard,* No. 44207, unreported slip op. (Ohio App. Oct. 25, 1984). Another co-defendant, Leland Waress, pleaded guilty to one count of conspiracy to commit kidnapping. (Doc. 10, Ex. E, p. 2; Tr. 5123).

From September 1, 1981 through October 10, 1981, O'Neal and two co-defendants, Lloyd Allen and Dimple Podborny, were tried before a jury. The jury found them guilty as charged in the indictments. The court sentenced O'Neal to a life term of imprisonment for aggravated murder, a seven (7) to twenty-five (25) year term for aggravated robbery, and a seven (7) to twenty-five (25) year term for kidnapping. *Id.*, Ex. A.

O'Neal pursued unsuccessful appeals in the Ohio Court of Appeals, Eighth Appellate District, and in the Ohio Supreme Court. (Doc. 10, pp. 2-4).

O'Neal then filed his pro se petition for a writ of habeas corpus in this Court raising eight grounds for relief. (Doc. 1). We appointed counsel from the Ohio Public Defender's Office to represent O'Neal. (Doc. 26).

O'Neal contends that since he was charged with a capital offense, he could not be tried with his co-defendants absent strict compliance with Ohio R. Crim. P. 14 and Ohio Rev. Code § 2945.20. (Doc. 1, p. 5). He claims that the prosecutor improperly exercised his peremptory challenges to excuse jurors solely on the basis of their race. (Doc. 31, pp. 9-21). He also argues that he was denied his rights under the fourteenth amendment when the Ohio Court of Appeals failed to address an issue he raised in his memorandum in support of his appeal. (Doc. 49, pp. 6-7, 9).

The majority of O'Neal's claims, however, concern his contention that he was denied his right to a fundamentally fair trial under the due process clause of the fourteenth amendment. O'Neal argues that the effect of five trial errors, when considered both alone and cumulatively, deprived him of a fair trial. These five alleged errors concern two claims

of constitutionally defective jury instructions, denial of his rights under the confrontation clause of the sixth amendment, prosecutorial misconduct, and the prejudicial admission of inflammatory evidence. *Id.* at 8-9.

Factual Background

The charges against O'Neal arose from the events leading to and surrounding the death of Henry Podborny, the owner and manager of the West Point Pallet Company in Chicago, Illinois. On January 29, 1981, Mr. Podborny's estranged wife lured him from his home near Chicago, Illinois to Cleveland, Ohio by pretending she wanted to resolve their marital difficulties. On April 24, 1981, his dead body was discovered in a field in Cleveland, Ohio.

The six individuals charged with the kidnapping, robbery, and murder of Mr. Podborny were O'Neal, the owner of an unlicensed saloon[1] in Cleveland; Lloyd Allen, O'Neal's employee and friend; Dimple Podborny, Mr. Podborny's wife; Lola Gail Toney, Mrs. Podborny's daughter-in-law by a prior marriage and O'Neal's friend, whom O'Neal had employed as a bookkeeper for a number of years in the past (Tr. 1749-50); Gary Gabbard, Toney's brother; and Leland Waress, an acquaintance of Mrs. Podborny. James McLean was also a member of the group involved in the plot against Mr. Podborny. McLean assisted law enforcement authorities in their investigation and testified at O'Neal's trial. He was not charged. (Tr. 3236).

The following facts are, in many respects, disputed. However, the version presented is supported by substantial evidence and is consistent with the jury's verdict. The events leading to the death of Mr. Podborny began in May 1980 when Mrs. Podborny asked her son's wife, Toney, if she knew anyone who could provide her with physical protection from Mr. Podborny. (Tr. 1762-63; 5349-50). Between 1969 and 1979, Mrs. Podborny's marriage to Mr. Podborny had been "perfect." (Tr. 5349). In

[1] During the evidentiary hearing the parties agreed that O'Neal's saloon, referred to in the record as a restaurant, a bar, a "cheap spot" or a "cheat spot," was an unlicensed saloon where liquor was sold after hours.

1980, however, the Podbornys experienced marital problems and separated. (Tr. 5350-51). In May 1980, Mrs. Podborny and her children from a prior marriage began receiving threats, apparently from individuals who were following the instructions of Mr. Podborny. (Tr. 5349). As a result of these threats, Mrs. Podborny informed Toney that she wanted to hire someone to protect her. (1762-63).

Toney then contacted McLean, whom she had met when she began working for O'Neal. (Tr. 1752). Toney and McLean devised a plan wherein she would introduce McLean to Mrs. Podborny as "Stan," a man with connections to organized crime, in order to convince Mrs. Podborny to pay $5,000 for physical protection. (Tr. 1768-76).

In June 1980, Toney and McLean met Mrs. Podborny and one of her daughters in Richfield, Ohio. Mrs. Podborny agreed to pay McLean $5,000, and asked him to hold her ring as collateral while she returned to Chicago to obtain the money. After the meeting, Toney and Mrs. Podborny travelled to Chicago where Mrs. Podborny paid Toney $5,000. Toney later gave McLean $2,500 as his share. (Tr. 1770-82, 2947-55, 2962-64).

In July 1980, McLean persuaded acquaintances to make threatening telephone calls to Mrs. Podborny to convince her that she continued to need protection. (Tr. 2964-66). In August 1980, Mrs. Podborny paid Toney an additional $10,000 for protection. Toney, in turn, gave McLean $2,000. (Tr. 2981-82). Mrs. Podborny paid Toney because she was terrified, she believed her life was in danger, and she trusted Toney. (Tr. 5357-59).

In August 1980, Toney travelled to Chicago and met with Mrs. Podborny. Mrs. Podborny informed Toney that she wanted to hire someone to murder Mr. Podborny. (Tr. 1784-86). Toney contacted McLean to discuss the amount they would charge Mrs. Podborny for arranging the killing.[2] They also planned to tell Mrs. Podborny that

[2] Toney disputed the fact that she and McLean intended to arrange the killing of Mr. Podborny. Toney, an admitted liar, Tr. 2120, repeatedly testified that she only pretended to arrange the killing in order to obtain more money from Mrs. Podborny. *See, e.g.*, Tr. 1790.

"Sonny" (a non-existent person) would kill Mr. Podborny.[3] A few days later, Mrs. Podborny paid Toney $24,400. Toney later gave McLean $1,000. (Tr. 1784-1818; 2966-29).

According to Toney, she telephoned O'Neal, her long-time friend and former employer. O'Neal travelled to Chicago. O'Neal and Toney discussed the fact that Mrs. Podborny wanted to have her husband killed. Toney claimed she gave O'Neal $6,500. (Tr. 1807-08; 1818-19; 4043-45; 4840-41). O'Neal had met Mr. and Mrs. Podborny about eight years earlier. At that time, Toney was O'Neal's bookkeeper in Cleveland. Toney introduced O'Neal to Mrs. Podborny apparently because Mrs. Podborny wanted to purchase a saw from O'Neal. Following the sale, O'Neal delivered the saw to the Podbornys' home near Chicago where he met Mr. Podborny. Between that time and August 1980, O'Neal did not again encounter Mr. Podborny. (Tr. 1826-27; 4835-37). Toney claimed she arranged a meeting between O'Neal and Mrs. Podborny, apparently during August of 1980. At that meeting, Toney alleged O'Neal pretended to be employed by "Sonny" to protect Mrs. Podborny from her husband. (Tr. 1820-21).

In late August 1980, Toney travelled to Chicago in order to calm Mrs. Podborny, who was upset because Mr. Podborny had not yet been killed. Mrs. Podborny informed Toney that she wanted Mr. Podborny killed at his business rather than at home. (Tr. 1798). In early September 1980, McLean travelled to Chicago and met with Toney and Mrs. Podborny. They discussed her impatience with the inaction. McLean suggested poisoning Mr. Podborny, but Mrs. Podborny rejected this idea. (Tr. 1812-13). Following the meeting, McLean and Toney reconnoitered Mr. Podborny's pallet company in order to plan a robbery. (Tr. 1813). Toney carried a .38 caliber revolver during the reconnaissance. (Tr. 3243-44).

In September 1980, Mrs. Podborny filed a petition for dissolution of marriage. (Tr. 1806, 5352). In her petition for dissolution, she alleged that her husband and two others were conspiring to murder her. (Tr.

[3] Toney also knew a "loan shark" named Sonny Pace. She testified, however, that Sonny Pace and the fictional "Sonny" were not the same person. (Tr. 1808-09; *see also* 3064-65).

5352-53).

In late September 1980, Mrs. Podborny left her home near Chicago and moved to Cleveland to live with her son and Toney. (Tr. 1822-23). Toney alleged she spoke with O'Neal nearly every day during this time. Although O'Neal was experiencing financial difficulties, she said she did not give him any more money. (Tr. 1822-23).

After living in Cleveland for several weeks, Toney and Mrs. Podborny drove to Chicago for two days to attend a hearing in connection with the dissolution action. Toney alleged that O'Neal and Allen also travelled to Chicago at this time. Toney, Allen, and Mrs. Podborny attended the hearing, during which the court gave Mrs. Podborny permission to re-enter her Chicago home to retrieve her property. O'Neal did not attend the hearing. Following the hearing, Toney, Allen and Mrs. Podborny went to the Podborny residence. O'Neal did not accompany them. When they arrived at the house, Mr. Podborny and several grandchildren were there. At some point, Mr. Podborny experienced a heart attack. Paramedics were summoned and he survived. Later that evening, O'Neal allegedly asked Mrs. Podborny why she had not let Mr. Podborny die. Mrs. Podborny responded that she could not because the grandchildren were present. O'Neal, Toney, and Mrs. Podborny returned to Cleveland together. (Tr. 1824-1832).

During November 1980, Mr. Podborny frequently telephoned Mrs. Podborny. (Tr. 1834). Toney and O'Neal allegedly talked "just about daily," because he was still experiencing financial difficulties. *Id.*

In December 1980, Mrs. Podborny asked Toney to contact Leland Waress, an individual with connections to the Hell's Angels motorcycle club, to ask him to arrange to have Mr. Podborny killed. (Tr. 1836-37). They also discussed kidnapping Mr. Podborny as a method for obtaining access to his money. (Tr. 1842-44). In January 1981, Toney met Waress and discussed not only having Mr. Podborny killed by a member of the Hell's Angels, but also a number of other plans, including a plan to kidnap Mr. Podborny and hold him in the basement of O'Neal's saloon in Cleveland. (Tr. 1840).

The conspirators eventually decided to have Mrs. Podborny lure Mr. Podborny to Cleveland under the guise of reconciling their marital problems. While Mr. Podborny was in Cleveland, Toney claimed O'Neal would kidnap and hold Mr. Podborny in the basement of his saloon while the others robbed the Podborny residence and the pallet company in Chicago. (Tr. 1836-1851). They would then return Mr. Podborny to Chicago, where he would be "given some medication and some whiskey and turned loose." (Tr. 1842).

At some point, Toney contacted her brother, Gary Gabbard, to obtain his help in robbing Mr. Podborny's residence and business. Waress told Gabbard that Toney had suggested that one way to avoid problems following the robbery was to murder Mr. Podborny. (Tr. 5173-5239). Gabbard agreed that killing Mr. Podborny was a possibility, because "dead people don't talk." (Tr. 5229).

In late January 1981, Toney and Waress met in Independence, Ohio. Toney told Waress that O'Neal had agreed to hold Mr. Podborny while the others robbed his residence and business. She showed Waress a list of Mr. Podborny's bank accounts and the amount of money in each account. They discussed the possibility of having McLean pose as Mr. Podborny after the kidnapping and murder, because McLean resembled Mr. Podborny. Following this meeting, Waress was excluded from the plan, apparently because the others decided they did not need him. Although Waress attempted to locate Toney and O'Neal, he was never able to do so. (Tr. 5173-5239).

Toney testified that, on January 29, 1981, the following events occurred. Mr. Podborny flew to Cleveland, Toney met him at the Cleveland airport and drove him to O'Neal's saloon. Toney left Mr. Podborny in front of the saloon and watched him enter. Between five and ten minutes later, O'Neal exited the saloon and entered Toney's automobile. O'Neal gave Toney Mr. Podborny's wallet, his traveler's checks, a credit card, and his keys. Toney took money from Mr. Podborny's wallet and gave it to O'Neal. She then drove around a nearby corner and stopped. (Tr. 1855-66; 1882-95). A few minutes later, Allen entered the car and told Toney that he had struck Mr.

Podborny with a pipe so that he could not run. (Tr. 1862). The trio did not discuss further what had happened inside the restaurant. Toney understood that Mr. Podborny "was secure. He wouldn't get loose." (Tr. 1863). Toney then drove O'Neal and Allen to another saloon. She left them and proceeded alone to a restaurant, where she telephoned McLean. Toney and McLean met in Richfield, Ohio, where Toney gave McLean Mr. Podborny's traveler's checks, credit card, and driver's license. They discussed several plans to obtain the money from Mr. Podborny's bank accounts. Later that evening, Toney gave Mrs. Podborny the wallet and keys. (Tr. 1855-96).

On January 30, 1981, Toney, Mrs. Podborny, Gabbard, and three others drove to Chicago. Toney, Mrs. Podborny, and Gabbard went to Mr. Podborny's home, where they found firearms and two coin containers. They also went to the pallet company, where Mrs. Podborny opened a safe, but did not find any money. They then returned to Cleveland. (Tr. 1896-1909).

During February and March 1981, Toney, Mrs. Podborny, and McLean attempted to obtain money from Mr. Podborny's bank accounts by establishing a bank account in Ohio under the name "Dimple Pallet Company" and transferring money from Mr. Podborny's bank accounts in Chicago to the Ohio account. (Tr. 1928-29; 1934-38; 3017-25). To avoid arousing suspicion over Mr. Podborny's disappearance, Toney, McLean, and Mrs. Podborny attempted to make it appear as though Mr. Podborny was travelling in different areas of the country. To this end, McLean, who resembled Mr. Podborny, flew to Florida posing as Mr. Podborny. Mrs. Podborny and Toney fabricated a letter that appeared to have been written and mailed by Mr. Podborny from Buffalo, New York. Mrs. Podborny later assured an employee at the pallet company that Mr. Podborny was in Florida and that she had received a letter from him that he mailed from Buffalo, New York. (Tr. 1930-1956).

O'Neal allegedly told Toney during February and early March 1981 that Mr. Podborny "was okay," (Tr. 1934, 1939). She informed McLean that O'Neal "wanted $500.00 for keeping Hank." *Id.* Toney claimed she gave O'Neal $300 in mid-March 1981. (Tr. 1941-45). By

late March, Toney believed that Mr. Podborny was no longer alive. (Tr. 1945-46). The record is not clear why she reached that conclusion. *See id.*

In mid-February 1981, McLean was arrested by FBI agents for forging Mr. Podborny's traveler's checks. McLean informed the agents that he knew about the disappearance of Mr. Podborny, and he agreed to assist them in locating him. On several occasions between March 17, 1981, and March 25, 1981, McLean met with Toney. With McLean's consent, the FBI recorded their conversations. The tapes, containing information regarding the participation of Toney and Gabbard in Mr. Podborny's kidnapping and murder, were admitted into evidence at O'Neal's trial. (Tr. 4783-90). (Doc. 10, Ex. D, p. 7).

On April 24, 1981, a dead body was found in a field in Cleveland. *Id.* On April 25, 1981, Dr. Lester Adelson, of the Cuyahoga County Coroner's Office, performed an autopsy on the body. (Tr. 3707). He determined that the victim had been struck at least five times in the head, and shot once in the forehead. (Tr. 378-09). The combination of these injuries caused death. (Tr. 3715). The victim had been dead "for a period of at least weeks." (Tr. 3711). Dr. Adelson examined the entire body and did not discover any injuries below the neck. (Tr. 3717). The body was later identified as Henry Podborny. (Tr. 3630-33).

OPINION

I. O'Neal's First Claim Is Not Cognizable In Federal Habeas Corpus

O'Neal argues that since he was charged with a capital offense, he could not be tried with his co-defendants absent strict compliance with Ohio R. Crim. P. 14 and Ohio Rev. Code § 2945.20. (Doc. 1, p. 5; Doc. 12, p. 5, Doc. 49, p. 11).

A federal court may review a state prisoner's habeas corpus petition only on the ground that the challenged confinement violates the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a). A federal court may not issue a writ of habeas corpus "on the basis of a

perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Smith v. Sowders*, 848 F.2d 735, 738 (6th Cir.), *cert. denied*, 488 U.S. 866 (1988).

O'Neal's first claim is not cognizable in the instant action, because he seeks to raise an issue of state law - whether the trial court erred in denying his motion for a mistrial under Ohio R. Crim. P. 14 and Ohio Rev. Code § 2945.20.

II. O'Neal's Challenge To The Racial Composition Of The Petit Jury Cannot Be Recognized

O'Neal argues that his rights under the sixth and fourteenth amendments were violated when State's counsel exercised his peremptory challenges to exclude six individuals from the petit jury solely on the basis of race. (Doc. 31, pp. 9-21). O'Neal concedes that *Batson v. Kentucky,* 476 U.S. 79 (1986), does not apply retroactively to the instant action, leaving him the "insurmountable" burden of establishing a prima facie case of racial discrimination under the standards of *Swain v. Alabama,* 380 U.S. 202 (1965). *Id.* at 13-16. Consequently, rather than mounting a fourteenth amendment *Swain*-based challenge, O'Neal argues that his sixth amendment rights were violated based on the standards announced in *Booker v. Jabe,* 775 F.2d 762 (6th Cir. 1985), *vacated sub nom. Michigan v. Booker,* 478 U.S. 1001, *reinstated,* 801 F.2d 871 (6th Cir. 1986), *cert. denied,* 479 U.S. 1046 (1987).

O'Neal's argument cannot be accepted, because the Supreme Court has now determined that the sixth amendment does not prohibit a prosecutor from eliminating prospective jurors on the basis of race. *See Holland v. Illinois,* 493 U.S. 474, 477-87 (1990). To avoid this ruling, O'Neal argues that *Holland* established a "new" rule of constitutional law and, as a result, it cannot be applied retroactively to bar his sixth amendment claim. (Doc. 49, pp. 12-13) (citing *Teague v. Lane,* 489 U.S. 288 (1989)).

Although he correctly states that a new rule of federal constitutional law does not apply retroactively to cases on collateral

review unless it fits one of the *Teague* exceptions, 489 U.S. at 310, this principle does not apply to *Holland*. When the Supreme Court determines, as in *Holland,* that a particular constitutional amendment does not contain a right that might be favorable to convicted defendants, the ruling does not implicate the concerns underlying retroactivity. These concerns focus on the deleterious effects that retroactive application of new rules of constitutional law have on the states, such as forcing states to justify the legality of a convicted defendant's confinement in light of newly evolved constitutional commands, depriving states of the opportunity to finalize criminal proceedings, and undermining the goal of deterring criminal activity. 489 U.S. at 309-10. None of these concerns apply to *Holland*, because convicted defendants cannot benefit from its holding. Consequently, defendants will not seek to collaterally challenge their convictions based on *Holland* and states will not suffer the costs of fending off such challenges.

O'Neal argues that he is entitled to benefit from the holding of *Booker* that the sixth amendment protects against racially discriminatory jury selection, 775 F.2d at 770-71, because *Booker* was in effect in the Sixth Circuit, and therefore "binding on . . . the State of Ohio" during O'Neal's direct state appeals. (Doc. 31, p. 19). O'Neal further argues, "Booker is still the law for the Sixth Circuit." O'Neal also argues that there exists an inequity in denial of retroactivity which prevents him from raising a fourteenth amendment *Batson* claim, while applying retroactivity to the *Holland* decision. *Id.* These contentions lack merit, because the Supreme Court held that the sixth amendment has never prevented a prosecutor from exercising peremptory challenges in a racially discriminatory manner. *See Holland,* 493 U.S. at 478. The sixth amendment right to raise a claim of race-based exclusion in jury selection did not die in *Holland,* it simply never existed. *Booker*, therefore, according to the Supreme Court, is implicitly an incorrect decision. *See Holland*, 493 U.S. at 478.

The aforementioned conclusion is reached with reluctance, because we do not personally agree with the *Holland* decision. The undersigned has, in a previous case, ruled the sixth amendment prohibits discriminatory jury selection. *See*, e.g., *Bell v. Morris*, No. C-1-86-1241, Report and Recommendation (S.D. Ohio June 29, 1989).

Nevertheless, we believe the *Holland* ruling requires the result reached in this case. However, the District Judge should be aware that a contrary analysis has been made by District Judge Spiegel in *Bell v. Morris*; C-1-86-1241 (S.D. Ohio Jan. 8, 1991). Judge Spiegel ruled that the *Holland* decision was not dictated by existing precedent and, therefore, represented a new rule of law that should not be applied retroactively. That decision is presently pending on appeal.

O'Neal's allegations of racially discriminatory jury selection are quite serious. He relies, in part, on the prosecutor's remarkable explanation for exercising his sixth peremptory challenge to exclude a black woman from the petit jury: "she was very defense-minded . . . and the fact that she has already testified for a defendant, and also *on the basis of race.*" (Tr. 1496-97) (emphasis added); *see also Ohio v. Podborny,* 41 Ohio App. 3d 135, 138 (Wiest, J., dissenting). The trial judge then informed the prosecutor that Ohio law provided him an unlimited right to exercise peremptory challenges. (Tr. 1497-98).

Since the Supreme Court has held the sixth amendment does not support O'Neal's challenge to discriminatory jury selection, and since *Batson* does not apply retroactively to O'Neal's conviction, he must rely on the fourteenth amendment as a basis for his claim. *Supra,* p. 10. O'Neal, however, has not attempted to establish a prima facie case of racial discrimination based on the standards of *Swain*. *See* Doc. 31, pp. 9-21.

Accordingly, O'Neal's second claim cannot be recognized as a separate ground for granting a habeas corpus writ.

III. The Trial Court Did Not Violate O'Neal's Rights Under the Confrontation and Compulsory Process Clauses of the Sixth Amendment

O'Neal claims that the trial court violated his rights under the Confrontation Clause of the sixth amendment by limiting his cross-examination of Special Agent Fredrick Graessle of the Federal Bureau of Investigation (FBI).

Graessle was subpoenaed as a witness by co-defendant Dimple Podborny to testify about McLean's role as an FBI informant. Graessle responded to a limited number of questions on direct examination, which previously had been submitted to and approved by the United States Justice Department in accordance with procedures set forth in 28 C.F.R. § 16.21, *et seq.*, regarding the disclosure of any information acquired by an employee of the Department of Justice in the performance of his official duties.[4]

On direct examination, Graessle testified that he was a special agent with the FBI in Cleveland, Ohio and that on March 10, 1981, McLean had asked him about the possibility of obtaining immunity from federal prosecution in return for "turning State's evidence." (Tr. 5081-82). Graessle said that he told McLean that he did not have the power to promise anything "on those lines," but did advise McLean that an Assistant United States Attorney, who was able to make promises regarding prosecution, "was very interested in obtaining McLean's cooperation regarding this matter." (Tr. 5082). When McLean asked Graessle whether there were other federal charges pending against him, Graessle told McLean that he knew of no other federal charges at that time, but that there were other crimes which had been uncovered as a result of the FBI's investigation with which McLean might be charged. *Id.* Graessle further testified that McLean said he might have information that could identify Podborny's killer, as well as when, where, and how Podborny may have been killed. (Tr. 5082-83).

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[4] These federal regulations prohibit Justice Department employees from disclosing such information without prior departmental approval. The regulations further provide:

> If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceedings, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

28 C.F.R. § 16.22(a), (c).

O'Neal's counsel sought to pose additional questions to Graessle on cross-examination, because Graessle had been present when O'Neal made certain incriminating statements to the Cleveland Police on March 26, 1981, and, according to O'Neal, was an "active participant in the gathering of evidence and prosecution of this case." (Doc. 31, p. 38; Tr. 203-17). O'Neal's counsel asked Graessle if he had been involved in the FBI investigation when Podborny's body was found and whether he could tell who provided the information "as to where that body was." (Tr. 5083-84). Graessle refused to answer these questions, stating "I'm not authorized by the Department of Justice to answer that." (Tr. 5084).

The trial court sustained objections to O'Neal's line of questioning after an Assistant United States Attorney explained at side bar that Graessle could not answer questions which had not been previously approved in accordance with federal regulations. (Tr. 5088). The court explained to the jury that "no employee of the Department of Justice may testify without prior authorization ... as to the questions he is going to be asked." (Tr. 5090-91). After the court sustained an objection to another question about Graessle's involvement in the presentation of the case, O'Neal's counsel said he would sit down without asking any further questions even though he had "a lot of other questions [he] would like to ask." (Tr. 5091).

On O'Neal's direct appeal, the Ohio Court of Appeals made the following findings of fact, which are entitled to the presumption of correctness:[5]

> [O'Neal] could have but did not subpoena the FBI Agent. [He] could have but did not submit the required application to the Justice Department. [He] could have but did not request a continuance of the trial so that he could pursue the application requirement.

(Doc. 10, Ex. C, p.8).

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5 *See* 28 U.S.C. § 2254(d); *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 455 U.S. 591, 597-98 (1982); *Nichols v. Perini*, 818 F.2d 554, 557-58 (6th Cir. 1987).

O'Neal argues that he should have been allowed to cross-examine Graessle about (1) the circumstances surrounding O'Neal's statements to the police to show the statements were unreliable; (2) the identity of the informant who found Podborny's body and notified the FBI of this fact to discredit the testimony of Wilbur Higgins, who testified that he notified a city inspector of the location of Podborny's body after O'Neal told him where it was; and (3) payments made to McLean for his testimony and by the FBI for his role as an informant in other cases to undermine McLean's credibility with the jury. (Doc. 49, pp. 24-25).

The Confrontation Clause of the sixth amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." One of the main purposes of the right of confrontation is to ensure a defendant's right to impeach and otherwise challenge adverse testimony by way of cross-examination. *See, e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Stevens v. Bordenkircher*, 746 F.2d 342, 346 (6th Cir. 1984). However, the right of confrontation does not include the right to cross-examine witnesses who have provided favorable testimony. *See United States v. Kindig*, 854 F.2d 703, 708 (5th Cir. 1988); *United States v. Crockett*, 813 F.2d 1310, 1313-14 (4th Cir.), *cert. denied*, 484 U.S. 834 (1987); *United States v. Andrews*, 765 F.2d 1491, 1501 (11th Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986). In determining whether or not a witness has provided adverse testimony implicating a defendant's rights under the Confrontation Clause, the Court must assess the actual content of the witness's testimony, not whether he was called by the prosecution or on behalf of a co-defendant. *United States v. Crockett*, 813 F.2d at 1314; *see also United States v. Kindig*, 854 F.2d at 708-09.

In this case, Graessle was not called as a witness by the prosecution, but by a co-defendant. He did not provide any testimony that could have adversely affected O'Neal's defense. Indeed, the testimony was favorable to O'Neal because it suggested that McLean had a self-interest motive in testifying for the prosecution. In posing additional questions to Graessle, O'Neal's attorney was attempting to elicit further favorable testimony, rather than impeach Graessle or to challenge the testimony he had given on direct examination. O'Neal's

rights under the Confrontation Clause were therefore not implicated by the trial court's limitation of the cross-examination of Graessle to only those areas covered by the authorization granted co-defendant Dimple Podborny.

The right to elicit favorable testimony is encompassed by the sixth amendment right of a defendant "to have compulsory process for obtaining witnesses in his favor." *United States v. Crockett,* 813 F.2d at 1313. The Compulsory Process Clause of the sixth amendment guarantees the criminal defendant's fundamental right to present witnesses in his own defense. *Taylor v. Illinois,* 484 U.S. 400, 408 (1988). The right to offer the testimony of witnesses and to compel their attendance, if necessary, is included in the right to present a defense, which is "a fundamental element of due process of law." *Id.* at 409, quoting *Washington v. Texas,* 388 U.S. 14, 19 (1967). However, although the right of the defendant to present evidence stands on the same footing as other sixth amendment rights, there is a significant difference between the right to compulsory process and other sixth amendment rights, because the availability of the right to compulsory process "is dependent entirely on the defendant's initiative." *Id.* at 410. The decision whether to employ the right to compel the presence and present the testimony of witnesses rests solely with the defendant, and the "very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct." *Id.* In the exercise of the right to present witnesses, the defendant must comply, like the prosecution, with established rules of procedure and evidence to assure both fairness and reliability in the trial proceedings. *Id.* at 411 and n.15.

In the instant case, O'Neal's counsel had the opportunity to demand the testimony of Graessle in accordance with the procedures set forth in 28 C.F.R. § 16.21, *et seq.,* but did not do so. Because he failed to exercise his right to compel the presence and present the testimony of Graessle, O'Neal cannot now claim that right was violated. *Cf. United States v. Marino,* 658 F.2d 1120, 1125 (6th Cir. 1981). Furthermore, defense counsel developed much of the same information O'Neal sought from Graessle during the cross-examination of police officers Timothy Patton and Jerry Hruby. (Tr. 3557-58, 4523-31, 4541-42).

Accordingly, O'Neal's claim that the trial court violated his rights under the Confrontation Clause or Compulsory Process Clause of the sixth amendment lacks merit.

IV. The Jury Instructions Regarding Intent Violated O'Neal's Right to Due Process of Law

O'Neal raises two arguments challenging the jury instructions given at trial. First, he argues that the trial court deprived him of a fair trial by giving extensive instructions on conspiracy which forced O'Neal to defend against a conspiracy charge not contained in the indictment. (Doc. 31, pp. 28-30). Second, O'Neal contends that the jury instructions deprived him of his rights under the fourteenth amendment Due Process Clause by relieving the State of its burden of proving beyond a reasonable doubt the intent element for each offense charged. (Doc. 31, pp. 22-26; Doc. 49, pp. 14-15; Doc. 65). According to O'Neal, this occurred when the trial court spoke of intent in terms of "the defendants or co-conspirators or aiders and abettors" as a group, which created the "automatic presumption that if any of the aider and abettors, co-defendants, or co-conspirators possessed the culpable mental state," it could be imputed to all others. (Doc. 49, p. 16). The instructions at issue are set forth verbatim in Appendix A, attached hereto.

A. The Conspiracy Instructions, In and Of Themselves, Did Not Violate O'Neal's Right To Due Process

Under the Due Process Clause of the fourteenth amendment, the charging method employed by a state must give the criminal defendant fair notice of the charges against him so that he may adequately prepare a defense. *See Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *see also Olsen v. McFaul*, 843 F.2d 918, 930 (6th Cir. 1988); *Koontz v. Glossa,* 731 F.2d 365, 369 (6th Cir. 1984); *Watson v. Jago*, 558 F.2d 330, 338-39 (6th Cir. 1977). It is a well established principle of procedural due process that notice of the specific charge, and an opportunity to be heard in a trial of the issues raised by that charge, are among the constitutional rights of every accused in both state and federal criminal proceedings. *Cole*, 333 U.S. at 201; *In re Oliver*, 333 U.S. 257, 273 (1948). *See generally Hovey v. Elliot*, 167 U.S. 409, 414-18 (1897).

In this case, the indictment provided O'Neal with fair notice of the charges against him. The indictment charged O'Neal with aggravated murder, aggravated robbery and kidnapping, and the trial court properly instructed the jury that those were the three counts before it. (Tr. 6157). The court restated the charges against O'Neal at the end of its instructions and discussed the elements of "conspiracy" and "aiding and abetting" solely for the purpose of determining complicity. (Tr. 6177-93). Indeed, the trial judge specifically pointed out when instructing on the elements of "conspiracy" and "aiding and abetting" that the defendants had not been charged with any offense under the Ohio conspiracy statute. (Tr. 6177-78). *Contrast Koontz v. Glossa,* 731 F.2d at 369-70.

In Ohio, a defendant can be charged with complicity either in terms of the principal offense or as an aider and abettor or co-conspirator in the commission of the principal offense. Ohio Rev. Code Ann. § 2923.03(A),(F) (Anderson 1987)(effective Jan. 1, 1974). *See Hill v. Perini,* 788 F.2d 406, 407 (6th Cir.), *cert. denied,* 479 U.S. 934 (1986). "This practice has apparently been established in Ohio for over 100 years." *Id.,* citing *Hanoff v. State,* 37 Ohio St. 178 (1881). This practice, which permits jury instructions on complicity even though the defendant has been charged and tried as a principal, does not deprive the defendant of due process of law. *Id.* at 407-08. Because the practice was settled law in Ohio at the time of O'Neal's trial, O'Neal had notice of the possibility that the judge might instruct the jury regarding aiding and abetting and conspiracy for the purpose of determining complicity. *Id.*

B. The Jury Instructions On The Intent Element Of Each Offense Violated O'Neal's Right To Due Process

The Due Process Clause of the fourteenth amendment requires a state to prove beyond a reasonable doubt every fact necessary to constitute the charged offense. *In re Winship,* 397 U.S. 358, 364 (1970). The reasonable doubt standard applies to each element of a criminal offense to minimize the possibility of any fact-finding errors in an attempt to ensure that a state incarcerates only the guilty. *See id.* at 363-

65. The trial court may not instruct a jury in a manner that shifts to a defendant the burden of proving a critical fact in dispute, not only because this violates a defendant's right to the presumption of innocence, but also because it increases the likelihood of an erroneous conviction. *Mullaney v. Wilbur,* 421 U.S. 684, 701 (1975). Where intent is an element of the charged offense, the court may not instruct a jury that the existence of certain facts automatically establishes the element of intent. *Sandstrom v. Montana,* 442 U.S. 510, 521-23 (1952). A jury instruction that creates such a mandatory presumption offends the Due Process Clause because it relieves the State of its burden of proof on an essential element of the charged offense. *Id.*

This case does not involve the use of a mandatory presumption, because the jury was never instructed that it must infer that the defendant had a purpose to commit the charged offenses based on other facts in evidence. *Cf. Clark v. Jago,* 676 F.2d 1099, 1104 (6th Cir. 1982), *cert. denied,* 466 U.S. 977 (1984). However, the principles set forth in *Sandstrom* and *Mullaney* are applicable, because the primary due process concern in those cases was whether the challenged practice had the effect of relieving the State of the burden of proof on an element of the crime charged. *Id.; see also Sandstrom,* 442 U.S. at 521-24; *Mullaney,* 421 U.S. at 699-701. If the challenged instruction is found to have had such an effect, the error will constitute a due process violation unless the instructions as a whole would have prevented a reasonable juror from assuming that the State did not have to prove the defendant's independent intent to commit the crimes charged. *See Francis v. Franklin,* 471 U.S. 307, 314-15 (1985).

In order to determine whether the challenged instructions relieved the State of the burden of proof on the issue of O'Neal's state of mind, it is necessary to examine what is required to establish intent under Ohio's complicity statute. *Cf. Flowers v. Blackburn,* 779 F.2d 1115, 1120 (5th Cir.), *cert. denied,* 475 U.S. 1132 (1986). The statute provides in pertinent part:

> (A) No person, *acting with the kind of culpability required for the commission of an offense,* shall do any of the following:

****

(2) Aid or abet another in committing the offense;

(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code[.]

Ohio Rev. Code Ann. § 2923.03 (Anderson 1987)(emphasis added).

Under this statute, aiders and abettors and co-conspirators must have the culpable mental state required for the commission of the principal offense. *State v. Lockett,* 49 Ohio St. 2d 48, 60 (1976), *rev'd on other grounds,* 438 U.S. 586 (1978). The Ohio Supreme Court has held, in the context of the crime of aggravated murder, that a defendant cannot be convicted solely because he engaged in a felony that resulted in a murder; rather, the prosecution must always prove intent to kill, including cases where it proceeds on a complicity theory. *State v. Scott,* 61 Ohio St. 2d 155, 166 (1980); *see also Clark v. Jago,* 676 F.2d at 1104. A jury may properly infer an aider and abettor's intent to kill where the facts show that the participants in a felony entered into a common design and the aider and abettor knew either that an inherently dangerous instrumentality was to be employed to accomplish the felony or that the felony and the manner of its accomplishment would be reasonably likely to produce death. *Scott,* 61 Ohio St. 2d at 165; *see also Lockett,* 49 Ohio St. 2d at 59-60. Therefore, the State in the instant case could attempt to prove O'Neal's intent to kill either by producing direct evidence of intent or by producing evidence to support a *Lockett/Scott* inference.

A jury instruction on intent to kill, based on the state of mind of "defendant and/or his accomplice," relieves the prosecution of its burden of proving an aider and abettor's independent intent to kill as required under Ohio law. In that circumstance, the instruction can be interpreted by a reasonable juror to mean that the defendant personally did not have to have the intent to kill in order to be convicted. The jury may believe that the accomplice's intent is sufficient to convict the

defendant for aggravated murder. *Clark v. Jago,* 676 F.2d at 1105; *Bell v. Morris,* 923 F.2d 854 (6th Cir. Jan. 24, 1991) (unpublished, available on Westlaw), *cert. denied,* 111 S. Ct. 2262 (1991). Here, the trial court did not go so far as to specifically state that O'Neal's intent to commit the crimes charged could be inferred from the state of mind of any other defendant, co-conspirator or accomplice. However, in instructing the jury on the elements of the offenses, the court discussed intent generally in terms of the state of mind of the "defendants, co-conspirators, or aiders and abettors" without reference to the intent required of each defendant individually. (*See* App. A, pp. 2, 3, 5-6, 7-8). These instructions were confusing, because they failed to set forth the requirement that each defendant have the intent to commit the offenses charged in order to be found guilty. Without further explanation, a reasonable juror could have interpreted these instructions to mean that a finding of intent on the part of one co-conspirator would be sufficient to establish the intent of others participating in the alleged conspiracy.

These errors in the jury instructions constitute a due process violation unless the instructions as a whole explained the confusing language so that a reasonable juror could not have concluded that the intent of one co-conspirator could be imputed to others. *See Francis v. Franklin,* 471 U.S. at 315; *Clark v. Jago,* 676 F.2d at 1105-06.

When instructing on the intent element of the crime of aggravated murder, the court stated:

> Wherein the evidence may disclose the existence of complicity by way of an aider and abettor or a conspiracy, the law of the state of Ohio is as follows: ... where you have an unlawful act contemplated in the original conspiracy, although not identical with or similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was performed was reasonable [sic] or likely to produce the death of another, then each conspirator, or aider and abettor is equally guilty as the principal offender

of the homicide.

(App. A, p. 2). This instruction was repeated to the jury when it requested a "brief definition of aggravated murder" during its deliberations. (Tr. 6208). Although the instruction was stated in pro-prosecution terms of a finding of guilt, it appears to set forth one of the two appropriate methods of inferring an accomplice's or co-conspirator's intent to kill under *Lockett* and *Scott*.

The trial judge also instructed the jury to "separately consider the elements applicable to each one of the defendants as [if] he or she were separately tried" and to "consider your finding as to each defendant uninfluenced by your verdict as to the other defendant." (App. A, pp. 3, 16). Further, when giving its instructions on complicity and conspiracy, the court told the jury that the State had to prove beyond a reasonable doubt the existence of a conspiracy or complicity among the defendants and the other co-conspirators before it could render a guilty verdict on the main charges. (App. A, pp. 7, 12, 13-14, 15). *Contrast Bell v. Morris,* 923 F.2d 854, at *13-14 (6th Cir. Jan. 24, 1991) (unpublished, available on Westlaw), *cert. denied,* 111 S. Ct. 2262 (1991).

On the other hand, no instructions were given regarding the requisite intent of an accomplice or co-conspirator on the charges of aggravated robbery or kidnapping. Nor did the court ever explicitly instruct the jury, with respect to any of the three offenses charged, that the State had to prove an accomplice's or co-conspirator's independent intent to commit the crimes. When instructing on the elements of complicity, the court stated: "[W]here two or more persons have a common purpose to commit a crime and wherein a continuing sequence over [sic] events other crimes are committed, all of the persons are responsible for all of the crimes that happen in the continuous sequence of the events even though all of said persons were not physically present when the other crimes were committed." (App. A, pp. 11-12). Given that the court repeatedly lumped "defendants, co-conspirators, and aiders and abettors" together throughout its instructions, without clarifying that an independent purpose to commit the crimes was necessary for a conviction, this instruction could have been interpreted by a reasonable juror to mean that an accomplice could

be convicted for crimes only the principal offender intended to commit during the sequence of events.

The risk that the jury could have wrongly interpreted the instructions on intent was substantially increased by the prosecutor's closing remarks:

> MR. MARINO: Now, I fear that defense counsel gave you the impression that each defendant must commit every element of the crime to be liable (sic). That's incorrect."

(Tr. 6075). The judge overruled an objection to this statement, thus appearing to endorse it. *Id.* The prosecutor continued:

> MR. MARINO: In the state of Ohio and in most states in my opinion we have what's called conspiracy and the judge is going to tell you about that. The State is bound to prove to a jury two things. First, that the crimes alleged have been committed. And at this point, is there any doubt in your mind that the man was kidnapped, he was robbed, he was bludgeoned and shot to death. The next thing we're bound to prove to you is that those accused of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes.
>
> MR. MILANO: Objection. It is a misstatement of the law, sir.
>
> THE COURT: Overruled.
>
> MR. MARINO: Folks, if that's a misstatement of the law, you are the second jury to hear it (referring to the trial of the codefendants).

MR. COUGHLIN: Objection, your Honor.

THE COURT: Overruled. I would indicate the first case will not be mentioned in this closing argument.

(Tr. 6075-76). By making the aforementioned rulings, the trial judge endorsed the prosecutor's misstatement of law and confirmed to the jury that a similar instruction had been given in the trial of the codefendants. The prosecutor's remarks were likely to have been accepted by the jury as the law, because they came from a state official charged with prosecuting criminal cases and were essentially endorsed by the trial judge. The jury was left with the impression that the State did not have to prove beyond a reasonable doubt an independent intent to commit each crime so long as it proved that each defendant was in some way involved in a conspiracy that eventually led to kidnapping, robbery, and murder.

In the context of the instructions as a whole, viewed in light of the prosecutor's remarks in his closing argument, which were endorsed by the trial court's refusal to sustain an objection, the remaining instructions were insufficient to dispel the possibility of confusion. A reasonable juror could have concluded that the intent of one co-conspirator could be imputed to other participants in the alleged conspiracy. Thus, these erroneous instructions constituted a violation of O'Neal's right to due process of law.

However, this does not end the inquiry. We must next determine whether this due process violation amounted to harmless error. *See Clark v. Jago,* 676 F.2d at 1105. Because this determination involves examination of the entire trial, we will make this analysis after review of other alleged errors. *See infra*, pp.41-49.

V. The Additional Alleged Trial Errors of Nonconstitutional Dimension Were Sufficiently Prejudicial to Implicate O'Neal's Fair Trial Rights

O'Neal argues that he was deprived of his fourteenth amendment Due Process right to a fundamentally fair trial because the trial court

erroneously admitted into evidence gruesome photographs of the murder victim, as well as other inflammatory physical evidence, and because the prosecutor committed acts of prejudicial misconduct during trial. (Doc. 31, pp. 30-36, 38-43).

The scope of federal habeas review of these claims is narrow. Where, as here, no specific constitutional guarantee is involved, these claims of ordinary trial error do not rise to a constitutional level unless the errors were so prejudicial as to deprive a defendant of a fair trial. *See Donnelly v. DeChristoforo,* 416 U.S. 637, 642-43 (1974); *Martin v. Foltz,* 773 F.2d 711, 716 (6th Cir. 1985), *cert. denied,* 478 U.S. 1021 (1986). *See also Cooper v. Sowders,* 837 F.2d 284, 286 (6th Cir. 1988).

A. The Admission of Certain Evidence Prejudiced O'Neal

O'Neal challenges the admission into evidence of eighteen photographs of the murder victim taken at the coroner's office, showing the victim from different angles in various stages of undress, and eight close-ups of the victim's face. (*See* Tr. 3710-13). O'Neal also challenges the admission of nine photographs showing the victim in the field where he was discovered; the actual "smelly" clothing and wrappings in which the victim was discovered; a jar containing the skin from the victim's left finger; a box containing scalp hair from the victim; and a crowbar found in O'Neal's bar. (*See* Tr. 3631, 4754, 4766, 4791, 4814).

In his assignments of error to the Ohio Court of Appeals, O'Neal argued only that the admission of photographs was prejudicial. (Doc. 49, A-164, II). Ordinarily, this would mean that O'Neal waived any claim on federal habeas review regarding the admission of the allegedly inflammatory physical evidence absent a showing of "cause" for and "prejudice" from his failure to raise this claim to the state appeals court. *See Ewing v. McMackin,* 799 F.2d 1143, 1148 (6th Cir. 1986); *see also Murray v. Carrier,* 477 U.S. 478, 485 (1986). However, the Ohio Court of Appeals *sua sponte* addressed whether the admission of Podborny's clothing, the skin from Podborny's finger and the crowbar unfairly prejudiced O'Neal. The only evidentiary issue the Court of Appeals did not address was the admission of the scalp hair. O'Neal has not

presented any justification for his failure to raise that issue to the state appeals court, and this Court should therefore consider that claim waived. However, since the Ohio Court of Appeals addressed the remainder of O'Neal's claims regarding the introduction of inflammatory physical evidence, this Court should consider those issues on the merits.

In determining whether the admission of the evidence was prejudicial to O'Neal, this Court must accord a presumption of correctness to the state court's findings of fact that are fairly supported by the record. *See* 28 U.S.C. § 2254(d); *see also Sumner v. Mata,* 455 U.S. 591, 597-98 (1982). This presumption of correctness does not attach to the state court's conclusions of law, or to its application of law to the facts. *Pryor v. Rose,* 724 F.2d 525, 528 (6th Cir. 1984)(en banc).

The Ohio Court of Appeals ruled on O'Neal's claim as follows:

> [The coroner's] photographs of the decomposed remains of the decedent, are relevant and contribute to proof that the decedent had been dead for a prolonged period of time before his body was found. The piece of finger skin, removed from the decomposed remains, was used to establish the identification of the decedent. In the chain of evidence, the identifying finger skin was relevant to the decomposed remains. The decomposed remains were relevant to proof that the body had lain for a long time in a secret place. Perhaps the number of photographs (18 of the decomposed remains) was somewhat excessive, but we consider the importance of its relevancy to far-out way [sic] the danger of unfair prejudice or confusion. We reach the same conclusion as to the introduction of the decedent's clothing. As an additional point, we find that amongst this clothing there was also introduced some other articles which were strongly relevant and indicative of an attempt to hide the body and we find that this is relevant to the case and not abusive. Over objection, the State also introduced a crow bar which was found in a bar owned and operated by ... O'Neal. We can find no relevancy amongst the evidence which would connect this crow bar with this case.... We ... conclude that the admission of this crow bar was erroneous. However, we do not conclude that, in view of all of the other evidence in the trial, that the admission of this exhibit was so prejudicial as to justify a reversal.

(Doc. 10, Ex. C, pp.6-7).

Ohio R. Evid. 403(A) generally provides that "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice." The risk of unfair prejudice occurs when the evidence is so gruesome or is "charged with such immediacy or emotional impact" as to produce an inflammatory reaction by the jury against the defendant. *State v. Benner,* 40 Ohio St. 3d 301, 311 n.2, 533 N.E.2d 701 (1988), *cert. denied,* 110 S.Ct. 1834 (1990); *State v. Tingler,* 31 Ohio St. 2d 100, 285 N.E.2d 710, 713 (1972); *State v. Hill,* 12 Ohio St. 2d 88, 90, 232 N.E.2d 394 (1967). The mere fact that the evidence is gruesome or horrendous is not sufficient to render it per se inadmissible. *State v. DePew,* 38 Ohio St. 3d 275, 281, 528 N.E.2d 542 (1988), *cert. denied,* 489 U.S. 1042 (1989). Rather, the risk of prejudice created by the introduction of such evidence must be balanced against the need for the evidence to prove an issue at trial. *See Papp v. Jago,* 656 F.2d 221, 223 (6th Cir.), *cert. denied,* 454 U.S. 1035 (1981); *see also State v. Martin,* 19 Ohio St. 3d 122, 129, 483 N.E.2d 1157 (1985)(per curiam), *cert. denied,* 474 U.S. 1073 (1986), quoting *State v. Maurer,* 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984), *cert. denied,* 472 U.S. 1012 (1985).

Under Ohio law, an additional element is involved in the balancing process when gruesome photographs are introduced in a capital prosecution. Such evidence is admissible only if "the probative value does not, in a simple balancing of the relative values, outweigh the

danger of prejudice to the defendant" and the photographs are not repetitive or cumulative in nature. *State v. Morales,* 32 Ohio St. 3d 252, 513 N.E.2d 267, 273-74 (1987). The Ohio Supreme Court has noted that this standard, which is stricter than the usual standard for the admission of evidence, "is justified in capital cases because gruesome photographs which depict the victim of the offense are charged with such immediacy and emotional impact that the risk of prejudice is enhanced proportionately, a risk that we are less willing to tolerate in a case where the defendant faces a penalty of death." *State v. Benner,* 40 Ohio St. 3d at 311 n.2.

We have studied the eighteen photographs taken at the coroner's office (St. Exs. 1 through 1-Q). All of these photographs are gruesome. They graphically depict the deterioration to the victim's body and the injuries to the skull area, as well as the victim's distorted facial features, which were discolored by the wrappings encasing the body. The photographs of the victim's head (St. Exs. 1 through 1-G) are especially gruesome. *Cf. State v. Rowe,* 163 W. Va. 593, 259 S.E.2d 26, 28 (1979). They constitute relevant evidence of cause of death, intent to kill, and the fact that the victim had been dead for a long period of time. The remaining ten pictures of the victim's body, which were taken as the wrappings and clothing were removed, are of possible relevance to prove efforts made to hide the body. The coroner and other witnesses, however, provided uncontradicted testimony at trial on all of these issues. (Tr. 3707-15). Furthermore, the defense did not contest either the cause of death, the intentional killing, or the efforts to hide the body. Thus, despite their relevancy, the risk of prejudice far outweighed the probative value, because there was no need to admit these photographs. Therefore, the admission of State's Exhibits 1 through 1-Q constituted prejudicial error.

As to the nine photographs introduced at trial showing the location where the victim's body was discovered, respondent submitted only seven to this Court for review.[6] The record indicates that six of the photographs depicted the area where the body was discovered, showing

[6] Respondent admits that these photographs may not be the same photographs introduced in O'Neal's trial, but that they were the only photographs that could be found depicting the location of Podborny's body. (Doc. 67).

only the body encased in wrappings, and the remaining three photographs depicted the body at the discovery site as it was unwrapped. (Tr. 4491-92). We have carefully studied the seven photographs submitted, and we find they are consistent with the record description. These photographs constitute relevant evidence of the attempt to hide the body and the condition of the body when it was found. The six photographs depicting the area where the body was discovered and the body encased in wrappings (St. Exs. 58, 58A, 58B, 58C, 58D, 58F) are not inflammatory. *Cf. State v. DePew,* 38 Ohio St. 3d at 281. Moreover, one of the three photographs submitted depicting the body as it was unwrapped at the scene (St. Ex. 58E) is not gruesome, because body parts are not recognizable in it. The remaining two photographs, which are close-up views of the victim's upper body and face, are gruesome enough to create a risk of prejudice. (St. Exs. 58G, 58H). The coroner and other witnesses provided uncontradicted evidence to establish the same facts these photographs were offered to prove. The defense did not contest the facts that the body was hidden and had deteriorated. Thus, despite their relevancy, the risk of prejudice far outweighed the probative value, because there was no need to admit these photographs. Therefore, the admission of State's Exhibits 58-G and 58-H constituted prejudicial error.

The admission of the jar containing the skin from the victim's left finger was prejudicial to O'Neal. We agree with the Ohio Appeals Court's finding that the skin was relevant to fingerprint identification of the decomposed remains as Mr. Podborny. However, the fingerprint taken from the skin, which was used to establish identity, was already in evidence. Furthermore, the identity of the victim was not contested by the defense. (Tr. 5714). Thus, although it was proper to preserve the victim's skin in the event the defense questioned the fingerprint identification, there was no need to admit the body part into evidence. The introduction of a part of the victim's body was charged with such emotional impact that it could only have constituted an appeal to the jury's passion. The risk of prejudice far outweighed the probative value of the evidence because there was no need for this evidence. Therefore, the admission of the victim's skin constituted prejudicial error.

The admission of a "crowbar" found in O'Neal's saloon when Allen

was arrested there around 12:00 a.m. on March 26, 1981 was also prejudicial to O'Neal. (Tr. 4439-40). The Ohio Court of Appeals found it was not relevant because there was no evidence connecting the crowbar with the murder. The crowbar was tested for the presence of blood, and the test results were negative. (Tr. 3702). Thus, the admission of the crowbar constituted prejudicial error.

Finally, the admission of the victim's malodorous bloodstained clothes as well as the wrappings that encased the victim's body was prejudicial to O'Neal. The Ohio Appeals Court concluded that the evidence had probative value because it tended to show that the body had lain for a long time before it was discovered and that attempts had been made to hide the body. However, there was other substantial uncontested evidence in the record to establish these facts, including photographs of the identical clothing and wrappings. (Tr. 4752-53). Thus, there was no need at all for the admission of this evidence. The admission of the victim's clothing and wrappings was highly inflammatory because the evidence was charged with an emotional immediacy. For these reasons, the admission of the said evidence constituted prejudicial error.

The aforementioned prejudicial errors are sufficient to trigger further inquiry as to whether O'Neal was deprived of a fundamentally fair trial.

B. The Prosecutor's Misconduct Prejudiced O'Neal

1. The Prosecutor Improperly Questioned O'Neal About A Previous Killing

O'Neal contends that the prosecutor improperly cross-examined him by eliciting details of a previous incident in which O'Neal shot and killed another person. O'Neal argues that the cross-examination elicited impermissible "other acts" evidence in violation of Ohio R. Evid. 404(B) and in violation of a court order prohibiting reference to the incident.

O'Neal's assignment of error to the Ohio Appeals Court regarding

this issue claimed trial court error rather than prosecutorial misconduct. (Doc. 49, App. A-164, IV). The Ohio Court of Appeals, however, addressed the issue and made the following factual findings regarding this claim, which are entitled to the presumption of correctness. *See* 28 U.S.C. § 2254(d).

> [D]uring the examination of a police officer, the prosecutor asked the court to direct all parties to refrain from asking why [O'Neal's] gun had been initially confiscated by the East Cleveland Police Department. The court ordered all parties not to examine witnesses concerning why [O'Neal's] gun had been confiscated. The jury was to know only that it was returned to him on January 6, 1981.
>
> [O'Neal's] gun had initially been confiscated because he was involved in a homicide. As a result of that investigation, he was charged with voluntary manslaughter, but the charge was eventually dismissed. During cross-examination, in spite of its previous order, the court permitted the prosecutor to extensively cross-examine [O'Neal] about the details surrounding the manslaughter case....

(Doc. 10, Ex. C, p.4). This is a clear indication of prosecutorial misconduct. Furthermore, since we have already identified prejudicial trial errors, we are required to examine the entire trial for fairness. *See Arizona v. Fulminante*, 111 S. Ct. 1246, 1263-64 (1991).

On direct examination, O'Neal attempted to explain why he received $6,500 from Toney and what he did with it. He stated the money was originally intended to be Toney's investment in his business and was to be used to purchase a liquor license. However, the license cost more than that, so he held the money for other purposes. Subsequently, he was charged with a crime in East Cleveland, the nature of which he did not describe, and he used the $6,500 to pay

attorney fees in that case. The case was dismissed, and he was able to retrieve a .38 caliber revolver that had been confiscated in connection with the case. He emphasized that the revolver was registered, and stated it would not have been returned otherwise. (Tr. 4844-46). His attorney then asked the following question and received the following answer:

> Q: You certainly wouldn't go out and kill someone with your registered gun, would you?
>
> A: I wouldn't do that.

(Tr. 4846-47). During direct examination, O'Neal did not mention the facts of the East Cleveland case except to say that he was "charged with something." (Tr. 4845).

Co-defendant Allen's attorney then elicited further testimony from O'Neal on the East Cleveland incident without mentioning that a shooting had occurred. O'Neal testified that a shell was fired from his revolver when it was confiscated in East Cleveland and that authorities had a sample of the bullet. (Tr. 4874, 4876). O'Neal testified further that there had been no testimony that the the bullets from his revolver had been compared to the bullet in evidence. (Tr. 4876).

On cross-examination, over numerous objections by O'Neal's counsel, the prosecutor asked the following questions, clearly implying that because O'Neal had killed Calvin Heinz in East Cleveland by shooting him in the head, he had done the same thing to Mr. Podborny:

> Q. You shot that pellet into Calvin Heinz' head, the same way you shot Henry Podborny in the head?
>
> ****
>
> A. No, I didn't shoot Calvin's head like that.
>
> Q. But you did shoot Calvin Heinz in the head, didn't you?
>
> ****

> A. No, I didn't shoot him in the head, it was an accident.

(Tr. 4908). During this exchange, O'Neal's counsel objected to each question, but the judge did not rule on the objections. *Id.*

> Q. You shot him in the head; is that correct?
>
> A. I had 50 witnesses brought in to say that it was on the record that they saw him when he was trying to kill me.
>
> Q. The only witnesses were two lady friends?

Id. The Judge overruled an objection to these questions. *Id.*

> Q. You attempted to mislead the jury yesterday in attempting to lead the jury to believe that your gun was confiscated because of a gun violation?
>
> A. It was confiscated by the East Cleveland Police because of a gun registration violation and because of the accident in East Cleveland.
>
> Q. Was the registration violation first?
>
> A. Yes.
>
> Q. And secondary importance to the East Cleveland police is the fact that Calvin Heinz was killed with a bullet fired in his head?

(Tr. 4910-11). The judge overruled an objection to this question. *Id.*

> A. Yes, it was, sir.
>
> Q. Did you tell the police that Calvin drew on you first and you shot him in the head?

[O'Neal's Attorney]: Objection, your Honor.

A. The witnesses saw that.

THE COURT: Sustained as to the other matter. I think you made a point and you go on to some other matter. Strike that. Go on to some other matter. I think you made a point out of this.

(Tr. 4911). Nevertheless, the prosecutor continued to compare the Heinz killing to the Podborny killing. (Tr. 4911-15). He asked O'Neal to acknowledge that the evidence had shown that Podborny was shot with a bullet "consistent with being fired from a Smith & Wesson .38 caliber." (Tr. 4912). The judge overruled an objection to this question. *Id.* The prosecutor continued:

Q. The gun that you used to shoot Calvin Heinz was a .38 caliber Smith & Wesson pistol?

A. I didn't use it to shoot Calvin Heinz.

Q. Did the bullet come out of the barrel by itself?

A. That's the gun I used.

Q. Do you know of any other way of firing a bullet from a revolver other than pulling the trigger?

A. I didn't pull the trigger, it was an accident. I hit the gun.

Q. You shot him in the head?

A. I hit him in the head. He was trying to shoot me.

Id. The prosecutor next attempted to have O'Neal compare the bullet

identified as coming from Podborny's body to the bullet in the East Cleveland case. He had O'Neal examine the bullet in evidence and acknowledge that testimony had established that "this is the pellet that killed Hank Podborny." (Tr. 4914). He continued:

Q. And the one that killed Calvin Heinz is like that is it not?

A. I don't know, sir.

Id. The prosecutor continued:

Q. Sir, if we had the pellet from Calvin Heinz we could have been able to compare the pellet from Calvin Heinz with the pellet from Mr. Podborny, couldn't we?

(Tr. 4915). The judge overruled an objection to this statement.

The prosecutor also called a rebuttal witness at the close of trial. The witness testified that O'Neal was arrested in the East Cleveland matter and told the arresting officer, "That guy pulled a gun on me so I shot him." (Tr. 5696).

Ohio R. Evid. 404(B) excludes the admission of evidence of "other crimes, wrongs, or acts" to prove the character of the accused in order to show that the accused acted in conformity with his character on the occasion of the crime charged. *State v. Sims,* 3 Ohio App. 3d 321, 445 N.E.2d 235, 238 (1981). The evidence is considered irrelevant because, among other things, it creates an "overstrong tendency" to believe the accused guilty of the charge merely because he is a person likely to do such acts as well as the tendency to condemn because the accused has escaped punishment from other offenses. *State v. Curry,* 43 Ohio St. 2d 66, 68, 330 N.E.2d 720 (1975). The introduction of such evidence is prejudicial because it may completely overthrow the presumption of innocence. *See Pierce v. United States,* 86 F.2d 949, 952-53 (6th Cir. 1936).

There are certain exceptions to this general rule. Proof of other bad acts is admissible to show motive or intent, the absence of mistake or accident, or a plan or system of doing an act. Ohio Rev. Code Ann. § 2945.59 (Anderson 1987); *see also State v. Curry,* 43 Ohio St. 2d at 69. Also, where a defendant in a criminal trial testifies as to his past good behavior and character, the State is permitted to impeach such testimony with evidence of past criminal conduct. *See State v. Hale,* 21 Ohio App. 2d 207, 256 N.E.2d 239, 244-45 (1969), citing *State v. Marinski,* 139 Ohio St. 559, 41 N.E.2d 387 (1942). In such a case, the extent of the examination into the character or reputation of the accused shall be no more than necessary to counter the evidence of good character presented by the accused. *Id.* at 245.

Moreover, the State has a limited right to challenge the credibility of a criminal defendant by evidence of prior offenses when the defendant takes the witness stand and gives testimony in his own defense. *See State v. Tharp,* 49 Ohio App. 2d 291, 297, 361 N.E.2d 469 (1976); *State v. Patterson,* 43 Ohio App. 2d 63, 71, 332 N.E.2d 770 (1974). Questions as to prior convictions under state or federal law or questions eliciting defendant's admission of committing a prior criminal act are proper for testing the defendant's credibility. *State v. Tharp,* 49 Ohio App. 2d at 295-96. Questions as to prior arrests, indictments or accusations are improper for testing credibility "since arrests, accusations and indictments are not appropriate evidence of the actual commission of a crime which would affect credibility." *Id.* at 295, citing *Wagner v. State,* 115 Ohio St. 136, 152 N.E. 28 (1926); *see also Jones v. Haskins,* 343 F. Supp. 645, 652-53 (S.D. Ohio 1971), *aff'd,* 459 F.2d 479 (6th Cir.), *cert. denied,* 409 U.S. 990 (1972). In situations where the accused denies having committed a prior criminal act and the State offers no impeaching testimony on that issue, questions as to whether the accused committed a prior criminal act are also improper "since there is nothing to, in fact, establish the commission of a prior offense" and credibility is thus left unchallenged. *State v. Tharp,* 49 Ohio App. 2d at 295.

The limitations placed on cross-examination to test a defendant's credibility rest in the sound discretion of the trial court, and the exercise of that discretion will not be disturbed in the absence of a clear showing

that such discretion was abused. *Id.* In the cases where Ohio courts have found no abuse of discretion in admitting such testimony, the trial courts had issued cautionary instructions at the time the evidence was introduced as well as at the close of trial, limiting the receipt of the evidence to the issue of credibility only. *See, e.g., id.* at 298-99; *State v. Patterson,* 43 Ohio App. 2d at 71. The Ohio Court of Appeals has cautioned that the State embarks on the course of introducing prior bad acts "at its peril," and that "the moment the impeachment process by evidence of prior or subsequent offenses passes the fine line separating the issue of credibility of the witness from the issue of the guilt of the defendant, prejudicial error intervenes." *State v. Patterson,* 43 Ohio App. 2d at 72.

In the instant case, O'Neal's attorney initially attempted to limit O'Neal's direct testimony regarding the East Cleveland matter to establish that O'Neal paid the $6,500 he received from Toney in legal fees and to show that his weapon was registered. However, he then foolishly went on to elicit testimony that O'Neal would not kill someone with a registered weapon. This opened the door for possible cross-examination on this issue.

The door having been opened, the prosecutor burst through it with a salvo of improper questions. He established that the East Cleveland matter was a case in which O'Neal had been accused of shooting Calvin Heinz in the head, and suggested this was the same manner in which he shot Podborny. He then coaxed an admission from O'Neal that it was indeed he who had shot Heinz in the presence of numerous witnesses. He also called a rebuttal witness to establish that O'Neal had admitted shooting Heinz. Finally, he attempted to compensate for the lack of scientific evidence showing the fatal bullet came from O'Neal's revolver by having O'Neal compare the bullet in the instant case to the one in the East Cleveland case.

During the course of this colloquy, the judge continuously overruled objections by O'Neal's counsel. He eventually sustained an objection, but only on the basis that the prosecutor had already made his point. The judge neither considered the relevance of this evidence nor balanced the risk of prejudice in receiving this evidence against its

relevance and need. At no time did the judge issue a cautionary instruction or an instruction limiting the questioning to the issue of O'Neal's credibility. Only one such instruction was given, much too late, during the charge to the jury at the close of trial.

Assuming, *arguendo*, that O'Neal's counsel opened the door to the prosecutor's questions about the Heinz shooting, the prosecutor went too far. He suggested to the jury that O'Neal shot Heinz the "same way [he] shot Henry Podborny in the head" and that the Heinz shooting was more than an accident or act of self-defense. This questioning was improper, particularly since the facts of the Heinz shooting had never been determined by a jury. *See State v. Tharp*, 49 Ohio App. 2d at 295. While this evidence had minimal relevance to the case at hand, it created a strong risk that the jury would use the evidence of the prior shooting for the improper purpose of finding O'Neal had the propensity to kill Podborny because he had killed another man or would convict him of the instant charges because he had escaped punishment for the prior shooting. *See State v. Curry*, 43 Ohio St. 2d at 68; *cf. United States v. Bakke*, 942 F.2d 977, 981-82 (6th Cir. 1991).

The prosecutor's improper cross examination, therefore, was sufficiently prejudicial to trigger further inquiry whether such conduct deprived O'Neal of a fundamentally fair trial.

2. The Prosecutor's Inflammatory Argument Prejudiced O'Neal

We consider the improper argument for two reasons. First, because there is a due process fair trial issue, we must examine the entire trial process for fairness. *Lundy v. Campbell*, 888 F.2d 467, 472 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 2212 (1990). Second, the improper arguments are an extension of the improper introduction of inflammatory evidence and the improper cross-examination of O'Neal; thus, they are part and parcel of the issues O'Neal raises.

In their opening and closing arguments, the prosecutors referred to the Heinz killing two times. These references crossed the line separating the issue of credibility from the issue of guilt. *See State v.*

Patterson, 43 Ohio App. 2d at 72. On the first occasion, the prosecutor said that O'Neal's "little problem in East Cleveland" was "in all actuality ... the killing of another human being." (Tr. 5809). On the second occasion, prosecutor Marino stated:

> [O'Neal] not only lied about being crazy about killing a man with a registered gun, counsel misled you, he further lied about how it occurred. "I hit him on the head and the gun went off." You show me one gun that is fired by hitting someone with the gun. You have to pull the trigger. He is going to complain it is a defective gun. Where is that gun?
>
> ****
>
> Which of you could shoot me first if I pulled a gun on you?... I also wonder about those situations. A guy pulled a gun on me so I shot him. Great.

(Tr. 6087-88). The judge overruled an objection to this argument. The latter statements improperly refer to facts not in evidence. No evidence was introduced on the subject of whether a gun can be fired by hitting a person with it, and no evidence was presented on whether a person could shoot another who had "pulled" a weapon first. The statements carry a great degree of credibility, coming from a state official charged with prosecuting criminal offenses. The jury was likely to accept these remarks as though they were credible testimony. These arguments could only have been intended to support the highly improper suggestion Marino made during O'Neal's cross-examination that O'Neal had intentionally murdered Heinz and thus must have murdered Podborny. The impact of this suggestion was magnified, because it came in the form of an opinion of a state official charged with the duty of investigating and trying criminal cases.

The prosecutor engaged in further misconduct during his closing argument by using the gruesome evidence of the victim's clothing and wrappings to appeal to the jury's passion:

> You are going to have [Mr. Podborny's] clothes back there. Grab those things, they stink, they've got blood on them. Wrap yourself in that blanket and see what the victim of a murder is like.
>
> ****
>
> Put a sheet over you, put the plastic over you. I tell you this now because this is what the case is all about.
>
> ****
>
> As I said, I asked you to do this, to get into the case, to really handle the case. You can always wash up later, folks.

(Tr. 6121-23). The prosecutor's improper reference to the crowbar in closing argument was also inflammatory. He advised the jury to "pick that crowbar up, you get dirt on your hands, you tell me about it." (Tr. 6120-21).

Had the jury followed this argument literally, one can picture the twelve jurors seated around a conference table in the jury room, each wearing an item of the bloodstained clothing the victim was found in, each in turn lifting the crowbar, while viewing the gruesome photographs of the corpse. In this manner, they would deliberate O'Neal's fate. Such appeals to the juror's passions are unconscionable. They diverted the juror's attention from their task of examining and weighing the evidence objectively, and urged them to convict O'Neal for reasons legally irrelevant to his guilt or innocence. *See United States v. Solivan,* 937 F.2d 1146 (6th Cir. 1991). *Cf. State v. Thompson,* 33 Ohio St. 3d 1, 514 N.E.2d 407, 420-21 (1987). Upon studying the closing argument, it becomes clear that the prosecutor introduced the gruesome evidence for the express purpose of enabling him to make an inflammatory argument at the conclusion of the case.

The prosecutors' improper arguments, therefore, were sufficiently prejudicial to trigger further inquiry whether such conduct deprived O'Neal of a fundamentally fair trial.

VI. The Improper Jury Instructions, Combined With The Prejudicial Trial Errors, Deprived O'Neal Of His Right To a Fair Trial

Although the admission of inflammatory evidence and the prosecutor's conduct at trial was prejudicial to O'Neal, his conviction will be upheld unless the errors, taken as a whole, rendered the trial fundamentally unfair. *See Lundy*, 888 F.2d at 472. Respondent has the burden of proving that the erroneous jury instructions constituted harmless error. *Clark v. Jago*, 676 F.2d at 1105. On the other hand, O'Neal has the burden of establishing that the nonconstitutional trial errors and prosecutorial misconduct amounted to constitutional error. *See United States ex rel. Miller v. Greer,* 789 F.2d 438, 443-44 (7th Cir. 1986)(en banc), *rev'd on other grounds sub nom. Greer v. Miller,* 483 U.S. 756 (1987). *Cf. United States v. Lane,* 474 U.S. 438, 460-61 (1986)(Brennan, J., concurring). He must demonstrate that the errors "tilted the scales in favor of a guilty verdict." *See Webster v. Rees,* 729 F.2d 1078, 1081 (6th Cir. 1984); *see also Walker v. Engle,* 703 F.2d 959, 968 (6th Cir.), *cert. denied,* 464 U.S. 951, 962 (1983). Nevertheless, the erroneous jury instructions may be considered together with the nonconstitutional trial errors to determine whether O'Neal was accorded a fair trial.

We agree with the following statement by Judge Ryan on behalf of the United States Court of Appeals for the Sixth Circuit regarding the elements of a fair trial claim:

> Tomes have been written about the meaning of due process under the fourteenth amendment. But we have searched in vain for any useful, authoritative statement by the Supreme Court, or by the countless other writers who have addressed the subject, defining the elements, the criteria, the immutable components of a fair trial within the meaning of the due process clause of the fourteenth amendment. The accumulated precedent and scholarship on the subject instructs us that procedural due process is, in the last analysis, simply the court's notion of "fundamental fairness," *Rochin v. California*, 342 U.S. 165, 172 (1952), and

compliance with the principles "implicit in the concept of ordered liberty."

Lundy, 888 F.2d at 470.

The latest pronouncement on this subject by the Supreme Court indicates that trial errors and "most constitutional errors can be harmless." *Arizona v. Fulminante*, 111 S.Ct. 1246, 1263 (1991). Such errors, which occur during the presentation of the case to the jury, may be "quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 1264. Other constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error. *Id.* The majority in *Fulminante* considered the latter to be "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.* at 1265. Following *Fulminante*, we must determine whether the prejudicial actions outlined above were "structural defects" in O'Neal's trial or whether they must be analyzed under a harmless error standard.

We seriously doubt that O'Neal could have received a fair trial in the emotional atmosphere created by the introduction of unneccessary and gruesome evidence; the evidence of a prior killing committed by O'Neal where the victim was shot in the head; the prosecutor's inflammatory argument designed to stir the passions of the jurors; and the effective endorsement of such actions by the trial judge through his overruling defense objections, failing to weigh the prejudice of such evidence, and failing to give prompt cautionary instructions.

Relevant factors to consider regarding prosecutorial misconduct are: 1) the degree to which the improper remarks have a tendency to mislead the jury and to prejudice the defendant, 2) whether they were isolated or extensive, and 3) whether they were deliberately or accidentally placed before the jury. *Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982) (en banc), quoting *United States v. Leon*, 534 F.2d 667, 678 (6th Cir. 1976).

The admission of twenty gruesome photographs of the victim and

the other inflammatory physical evidence, coupled with the prosecutor's improper arguments regarding such evidence, were designed to influence the jury to convict O'Neal out of sympathy for the victim and passion concerning the nature of the killing as well as to punish O'Neal for the vileness of the deed, rather than on the basis of the evidence. Moreover, the prosecutor's excessive questioning regarding the details of the Heinz killing, coupled with his improper argument concerning that evidence, could have influenced the jury to convict O'Neal solely to punish him for killing another man, thus adding to the possibility that O'Neal was convicted for reasons that had nothing to do with the objective evidence presented regarding Podborny's kidnapping and murder. The prosecutor's prejudicial questions and remarks were extensive rather than isolated. The trial judge's effective endorsement of these actions encouraged the jury to give them their full prejudicial effect.

The obvious purpose and the likely result of such inflammatory evidence and improper arguments was to cause the jury to abandon its impartiality in weighing the evidence. Added to that are the confusing jury instructions and the improper prosecution argument concerning them, which could have led a reasonable juror to conclude that O'Neal could be convicted of each crime absent specific intent, so long as his accomplices had the necessary specific intent. Furthermore, although the Supreme Court has forclosed this issue as an independent ground for constitutional error, it is important to note that O'Neal was intentionally deprived of the presence of any juror of his race to deliberate his fate.

Following the mechanical approach in *Fulminante* of dividing fair trial issues into two exclusive categories, we believe the circumstances outlined above created a "structural defect" in the trial. To paraphrase the Court in *Fulminante*, in the absence of an impartial jury, " 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.' " 111 S.Ct. at 1265, quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986).

On the other hand, the Supreme Court's admonition that trial

errors and most constitutional errors can be harmless, 111 S.Ct. at 1263, indicates it would be wise to make a harmless error analysis.

Under the harmless error analysis, if review of the entire record reveals that the evidence of guilt is overwhelming, even a substantial error will not transform an otherwise fair trial into an unfair trial because it is likely that the error had little, if anything, to do with the jury's verdict. *See, e.g., Kirby v. Dutton,* 831 F.2d 1280, 1283-84 (6th Cir. 1987); *Webster v. Rees,* 729 F.2d at 1081; *Cook v. Bordenkircher,* 602 F.2d 117, 121 (6th Cir.), *cert. denied,* 444 U.S. 936 (1979). *See also Lundy v. Campbell,* 888 F.2d at 481. The "entire record" refers to all that occurred from the empanelment of the jury to the return of the verdict. *Id.* It includes, among other things, the quality and quantity of the evidence of the defendant's guilt; the extent to which the evidence of guilt was consistent or inconsistent, contradicted or uncontradicted, and clear or vague; the manner in which the evidence was presented; the interest or bias of the witnesses; whether witnesses' testimony was impeached; the extent of defense counsel's objections to the practices now assailed as unfair; and everything the jury saw and heard, such as legal arguments, objections, evidentiary rulings and the court's instructions to the jury. *Id.* at 472-73. Although reviewing courts cannot know the actual impact the errors had on a jury, they must strive to "evaluate the likely effects . . . , based on reason, principle, and common human experience." *Estelle v. Williams,* 425 U.S. 501, 504 (1976); *see also Holbrook v. Flynn,* 475 U.S. 560, 567-68 (1986); *Illinois v. Allen,* 397 U.S. 337, 344 (1970).

At trial, the State introduced the following evidence of O'Neal's guilt.

Toney testified that O'Neal was present at his saloon on January 29, 1981, when she left Mr. Podborny there, according to a prearranged plan. (Tr. 1855-58). She said she waited for several minutes, at which time O'Neal came out and brought her Podborny's keys, wallet and travelers' checks. (Tr. 1859). Toney testified that Allen came from the saloon, entered the back seat of her car, and said he had hit Mr. Podborny on the legs with a pipe so he could not run. (Tr. 1862). A police officer testified that Allen and O'Neal admitted that Mr. Podborny was

brought to O'Neal's place; that he was forcibly restrained at that time; that O'Neal gave Mr. Podborny's personal effects to Toney, who was waiting outside; and that Allen later came out saying he had hit Podborny with a pipe in the legs. (Tr. 4446, 4464-65). They claimed that an unknown black male was involved in apprehending Mr. Podborny. Allen stated that he did not actually strike Mr. Podborny in the legs, even though he acknowledged to Toney that he had, and that when he returned to O'Neal's bar later that evening, Mr. Podborny was gone. (Tr. 4447, 4460).

Physical evidence admitted at trial tended to show that Podborny was killed in O'Neal's bar. Blood was found on a mirror square, panels, and ceiling tile in the bar. Scientific test results showed that the blood from the panels matched the blood found on the victim's shirt. (Tr. 3684). There was testimony that no more than six percent of the population has that blood type. (Tr. 3685-86). Other tests demonstrated that the manner in which the blood spattered was consistent with Mr. Podborny's height. (Tr. 3693). There was further testimony that paint found on the victim's body was similar to paint from O'Neal's bar in color tint and porosity, although no conclusive match could be made. (Tr. 3653). Finally, O'Neal's counsel conceded in closing argument that Podborny was killed in O'Neal's saloon. (*See* Tr. 5841).

Tape recordings of phone conversations between Toney and Allen, which occurred on March 25, 1981, after Toney had been apprehended and before Allen's arrest, were introduced. In the first conversation, Toney asked Allen to tell O'Neal that "we have got a doctor up here that's going to certify Hank and commit him . . . so it's important that I get him ... alive." (Tr. 4983). Instead of denying knowledge about Mr. Podborny or his whereabouts, Allen responded by asking, "You need him there?" *Id.* When Toney told Allen that Mrs. Podborny would get everything once Podborny was committed, Allen asked, "It's going to be Dimple's?" (Tr. 4984). Toney responded, "Right. But Hank has to show up, you know." *Id.* At that point, Allen again asked, "You mean you need him there?" When Toney answered in the affirmative, he said, "Okay. I'll get right to him." *Id.*

In another taped conversation with Toney, Allen asked, "You ain't

said nothing about nothing to that doctor, have you?" (Tr. 5006). When Toney told Allen "no," the conversation continued:

> Allen: [D]on't say nothing to him about that.
>
> Toney: What do you mean?
>
> Allen: Uh, about anything. You know, about, you know, that package.
>
> ****
>
> Toney: Dimple already told the doctor some things and got it all set....
>
> Allen: Oh no....
>
> ****
>
> Toney: Is he in pretty good condition?
>
> Allen: Yeah.
>
> Toney: Okay. Because you know ....
>
> Allen: That package is in good condition.
>
> Toney: Okay. 'Cause if, you know, this doctor, we don't want another witness.
>
> ****
>
> Allen: Well, sure don't, that's why I said don't say nothing about the package.
>
> ****
>
> Toney: Is, uh, he on any kind of drugs? 'Cause that doctor can tell. That, you know, the package.
>
> Allen: Okay. Well, meanwhile until you hear from him, don't do nothing till [sic] you hear from

> him, okay?
>
> Toney: Uh, Lloyd, it's, it's more money than we ever thought of having.
>
> Allen: 'Cause it'll be best not to even say nothing until and see what he's going to say first. Okay?
>
> Toney: Well, but we'll lose the money if we, if we can't deliver.
>
> Allen: Uh, uh. I know it. But then you know how he is.

(Tr. 5007-12).

Wilbur Higgins testified that, when he visited O'Neal in jail on April 2, 1981, O'Neal said that he and Allen had killed a man and had placed his body in the field next to Higgins' home. (Tr. 3726-27). Higgins testified that O'Neal asked him to go out in the field and cover the body, saying that his life was in Higgins' hands. (Tr. 3726). Higgins said he never went to the field because he did not want to become involved and he notified a city inspector of the body's location two weeks later. (Tr. 3728). Higgins also said that, one night during the winter of 1981, he saw O'Neal and Allen with a car parked at the back of his building. (Tr. 3730). O'Neal told Higgins that he and Allen "had two womans [sic] back there in the car," and asked Higgins "to leave for a while. (Tr. 3730-31). Higgins did not see any women and left. *Id.* The car was parked approximately ten to twelve feet from where Mr. Podborny's body was later found. (Tr. 3733).

Although the evidence against O'Neal was substantial, it was not overwhelming. The testimony of Toney and McLean must be viewed with caution because they were admitted accomplices. *See* Ohio Rev. Code §§ 2923.01(H)(2) and 2923.03(D). Toney's testimony was contradicted by McLean, who provided a radically different version of the events related to him by Toney. The State presented no evidence regarding O'Neal's continuing presence in the saloon where the victim was apparently murdered. O'Neal testified that he had a separate

residence and other business investments. Thus, the possibility existed that Podborny could have been murdered in O'Neal's saloon without O'Neal's knowledge. O'Neal denied his alleged oral statement to police, and no written statement existed.

O'Neal's theory at trial was that Toney and Gabbard kidnapped Podborny and murdered him in O'Neal's saloon without O'Neal's knowledge. (Tr. 5840-43). Both Allen and O'Neal testified and denied involvement in the robbery, kidnapping or murder. (Tr. 4868, 4873, 4961). O'Neal denied seeing any blood in his saloon and said he did not know how the blood got there. (Tr. 4898). O'Neal and Allen both testified that Toney had a set of keys to O'Neal's bar. (Tr. 4900, 4902). Allen testified that he was beaten to coerce him to make and sign a statement corroborating Toney's version of the events. (Tr. 4959). Allen also explained that he had trouble hearing Toney in her phone conversations with him and that his impression was that she was referring to O'Neal, "as far as putting him in a hospital for his hernia operation." (Tr. 4947-48).

Most importantly, Higgins' credibility was seriously undermined at trial. O'Neal denied that he told Higgins he and Allen had killed Podborny and that he asked Higgins to cover the body. (Tr. 4860). On cross-examination by O'Neal's counsel, Higgins stated that he was arrested and held in jail for five hours before he told his story to the police. (Tr. 3758-59). Although Higgins said he decided to talk to the police out of his "own free will" and they did not put words in his mouth, he admitted telling defense counsel in an interview at his home that he signed a statement for the police because they threatened he would be charged with murder if he did not do so. (Tr. 3761, 3776, 3783, 3789).

The above analysis demonstrates that the jury had substantial credibility issues to resolve. The improper instructions on state of mind could have led the jury to convict even if they believed O'Neal's version of events, on the basis that O'Neal had been involved in a conspiracy to obtain money from either Mrs. or Mr. Podborny that eventually led to kidnapping, robbery and murder. *See* discussion *supra*, pp. 18-24. The impartial atmosphere in which the jury should have resolved these issues was destroyed by the needless introduction of gruesome evidence,

the prosecutor's inflammatory argument regarding said evidence, the prosecutor's improperly establishing that O'Neal had previously killed a person by shooting him in the head with his revolver, and by the prosecutor's improper suggestion that the previous killing was credible evidence that O'Neal was guilty of Podborny's murder. Additionally, the prosecutor intentionally deprived O'Neal of jurors of his own race to help determine his guilt. We find it impossible to conclude that these factors "pale into relative insignificance" in the face of the record evidence of O'Neal's guilt. *See Lundy*, 888 F.2d at 481.

For all these reasons, we conclude O'Neal did not receive a fair trial.

VII. The Failure of the Ohio Court of Appeals to Address an Assignment of Error Deprived O'Neal of Due Process of Law

O'Neal claims that his rights under the fourteenth amendment were violated when the Ohio Court of Appeals failed to address his state law claim that the trial court erred in denying his motion for a separate trial. O'Neal raised that claim as an issue on appeal in his seventh assignment of error.

The first six assignments of error were filed in two separate briefs on July 15 and 26, 1982. (Doc. 10, Ex. D, p.9). On May 12, 1983, O'Neal filed a motion to file a supplemental brief instanter adding the seventh assignment of error. (Doc. 49, App. A-224). That motion was allowed on June 3, 1983. *Id.*, App. A-114. However, in its opinion affirming the trial court's judgment, the Appeals Court did not address the seventh assignment of error. (Doc. 10, Ex. C). Only Judge Stillman addressed the issue in his dissenting opinion. He concluded that the trial court's judgment should have been reversed on the ground that the individual defendants in the Podborny cases should have been tried separately from one another. *Id.*

On July 30, 1985, O'Neal filed a motion for reconsideration requesting the Appeals Court to address the seventh assignment of error. (Doc. 49, App. A-250). On September 4, 1985, the Appeals Court

denied the motion in a two-to-one decision without stating any reasons for the denial. *Id.*, App. A-115. After the Ohio Supreme Court dismissed O'Neal's appeal, O'Neal filed a complaint for writ of mandamus with the Ohio Supreme Court seeking an order requiring the Appeals Court to rule in writing on O'Neal's seventh assignment of error. *Id.*, App. A-217. On April 2, 1986, the Ohio Supreme Court denied the writ without opinion. *Id.*, App. A-278.

Ohio R. App. P. 12(A) provides that "[a]ll errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error." As a matter of state law, failure to rule on an assignment of error presented on appeal constitutes reversible error, requiring remand to the Appeals Court for compliance with Rule 12(A). *State v. Jennings,* 69 Ohio St. 2d 389, 433 N.E.2d 157 (1982); *Lumbermen's Underwriting Alliance v. American Excelsior Corp.,* 33 Ohio St. 2d 37, 294 N.E.2d 224 (1973); *Rothfuss v. Hamilton Masonic Temple Co.,* 27 Ohio St. 2d 131, 271 N.E.2d 801 (1971).

The parties have not cited, nor could the Court find, any case addressing the specific issue presented here - whether the failure to rule on an assignment of error presented on appeal, as required by state law, constitutes a violation of the fourteenth amendment. In *Smith v. Lockhart,* 882 F.2d 331, 334-35 (8th Cir. 1989), *cert. denied,* 110 S.Ct. 739 (1990), the Eighth Circuit held that federal habeas relief was not available to a petitioner who claimed that he was denied due process when the trial court violated its procedural rules by denying his motion for post-conviction relief without a hearing and without making written findings. The court reasoned that there is no constitutional right to state post-conviction review of convictions and that petitioner had not alleged the violation of any constitutional standard which could apply to the state's post-conviction review process in general or to the facts of that case in particular. *Id.* This case is distinguishable from *Lockhart* in that O'Neal claims that he was denied due process based on the failure of the Appeals Court to address a claim on his first appeal as of right.

It is well-settled that the Constitution does not require states to grant appeals as of right to criminal defendants seeking review of alleged trial errors. *Evitts v. Lucey,* 469 U.S. 387, 393 (1985). However,

once a state does provide the right to appeal following a criminal conviction, the appeal process must comport with the fourteenth amendment's guarantees of due process and equal protection. *Id.* at 393, 403; *see also Douglas v. California,* 372 U.S. 353, 356-57 (1963); *Griffin v. Illinois,* 351 U.S. 12, 18 (1956). Under the fourteenth amendment, the State must provide a free transcript of the trial to indigent criminal appellants if that is the only way to assure an adequate and effective appeal. *Evitts,* 469 U.S. at 393, citing *Griffin,* 3511 U.S. at 20. Moreover, a first appeal as of right is not adjudicated in accord with due process if the criminal appellant does not have the effective assistance of counsel or is not provided with an impartial and disinterested tribunal on appeal. *Id.* at 396; *Bradshaw v. McCotter,* 785 F.2d 1327, 1329, *modified on reh'g on other grounds,* 796 F.2d 100 (5th Cir. 1986). A delay in the determination of a direct appeal also may violate the fourteenth amendment guarantees of due process and equal protection. *See Burkett v. Cunningham,* 826 F.2d 1208, 1221 (8th Cir. 1987); *Mitchell v. Zimmerman,* 582 F. Supp. 186, 187 (E.D. Pa. 1984). In addition, the denial of a criminal appellant's request to proceed on appeal *in forma pauperis* may deprive the appellant of his constitutional right to equal protection. *Harris v. Rees,* 794 F.2d 1168, 1175-76 (6th Cir. 1986).

The purpose of a first appeal provided as of right by a state is to determine whether the individual defendant has been lawfully incarcerated and to ensure a correct adjudication of guilt or innocence. *See Evitts,* 469 U.S. at 402; *Griffin,* 351 U.S. at 18-19. By deciding that an appeal is so important that it must be available as a matter of right, the State itself recognizes that the appeal plays such a crucial role that it cannot be decided arbitrarily; nor can the State otherwise deny an appellant fair procedure. *Burkett,* 826 F.2d at 1221, citing *Evitts,* 469 U.S. at 404. Due process concerns are implicated when the State fails to assure a criminal defendant an adequate opportunity to present his claims and to obtain a final determination on the merits of the appeal. *Evitts,* 469 U.S. at 402, 405; *see also Burkett,* 826 F.2d at 1221;*Galloway v. Stephenson,* 510 F. Supp. 840, 842 (M.D.N.C. 1981). Equal protection concerns are implicated when the State treats a class of defendants differently for purposes of offering them a meaningful appeal. *Evitts,* 469 U.S. at 405.

In this case, the Appeals Court essentially deprived O'Neal of a fair opportunity to obtain an adjudication on the merits of his first appeal when it refused to address his seventh assignment of error in accordance with state appellate procedural rules. O'Neal was entitled to a ruling on the seventh assignment of error, particularly in light of the fact that one of the three appellate judges concluded that the seventh assignment of error merited reversal of O'Neal's conviction. By failing to rule on this arguably meritorious claim, the majority opinion undermined the very purpose of providing a first appeal of right - to assure that the defendant is lawfully incarcerated.

Respondent argued in its memorandum opposing jurisdiction to the Ohio Supreme Court that because the seventh assignment of error was filed in a third filing approximately one year after the initial filings of assignments of error, the Appeals Court either overlooked the claim or deliberately disregarded it as untimely filed. (Doc. 10, Ex. D, p.9). However, even if it was untimely filed, the Appeals Court allowed O'Neal's motion to file a supplemental brief instanter adding the assignment of error, thereby permitting the issue to become part of the record. The Appeals Court could not have overlooked the claim, because one of the judges ruled on it in dissent, and the court denied O'Neal's subsequent motion for reconsideration explicitly seeking a ruling on the seventh assignment of error. Rather, it appears the majority of judges intentionally ignored the claim.

Respondent further argues that O'Neal was not prejudiced by the failure of the Appeals Court to rule on the assignment of error because the issue was addressed by that court in each of O'Neal's co-defendants' cases. (Doc. 59, p.36). However, when a criminal defendant is deprived of his right to a complete and effective appeal, he need not demonstrate that he was prejudiced or that he has arguable grounds for a successful appeal. *Galloway*, 510 F. Supp. at 844, citing *Rodriquez v. United States*, 395 U.S. 327 (1969). "[W]hen the right to appeal itself is lost, the fairness of the proceeding is immediately impugned, without any further showing of harm being necessary." *Id.* at 844 n.4; *cf. Mitchell*, 582 F. Supp. at 188.

Accordingly, the failure of the Appeals Court to rule on O'Neal's seventh assignment of error violated O'Neal's right to due process of law under the fourteenth amendment. The remedy for this violation is a fair appellate review of the unaddressed claim, or, if no appellate review is afforded, issuance of a writ of habeas corpus. *See Reynolds v. Lockhart*, 497 F.2d 314, 316 (8th Cir. 1974); *see also Dowd v. Cook*, 340 U.S. 206, 210 (1951).

IT IS THEREFORE RECOMMENDED THAT:

1. O'Neal's petition for writ of habeas corpus be DENIED as to the following claims:

   (a) Claim that O'Neal should not have been tried with his co-defendants;

   (b) Claim challenging the racial composition of the jury.

2. O'Neal's petition for writ of habeas corpus be GRANTED unless respondent retries O'Neal within ninety (90) days of the date of this Court's final judgment, or within such further time as the Court may allow for good cause shown, based upon the following claims:

   (a) Claim of constitutionally defective jury instructions;

   (b) Claim that prosecutorial misconduct and erroneously admitted evidence deprived O'Neal of a fundamentally fair trial.

3. In the event the District Judge does not adopt recommendation 2 above, O'Neal's petition for writ of habeas corpus as to the claim of a denial of due process of law based on the Ohio Court of Appeals' failure to address an assignment of error should be GRANTED. Counsel for O'Neal should be ordered to file a motion to reinstate the appeal with the Eighth District Court of Appeals of Ohio

within 30 days of this Court's Order. In the event that the appeal is not reinstated within 60 days of the filing of O'Neal's motion, his petition for writ of habeas corpus should be granted and O'Neal should be released pending further proceedings. The respondent should be ordered to notify the Court in writing upon reinstatement of the appeal and to file a motion to dismiss this action. O'Neal should notify the Court in writing upon expiration of the 60 day period if the appeal is not reinstated.

Date: 1-22-92

Robert A. Steinberg
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,
Petitioner

vs Case No. C-1-86-0976

ARTHUR TATE JR.,
Respondent

APPENDIX A
TO REPORT AND RECOMMENDATION

The jury instructions given by the trial court on the offenses charged against O'Neal and his co-defendants, as well as on conspiracy and complicity, are attached in relevant part as follows:

Aggravated murder, therefore, is the killing of another purposely and with prior calculation and design. Before you can find the defendants Robert O'Neal, Lloyd Allen, Dimple Podborny guilty of aggravated murder, you must find beyond a reasonable doubt, ladies and gentleman, that first that Henry Podborny was a living person and that his death was caused by the defendants, or by a conspirator, co-conspirator or one aiding and abetting the defendants....

Secondly, that the killing was done purposely and, thirdly, that the killing was done with prior calculation and design, and, fourthly, that the act was an [sic] unlawful done willfully.

(Tr. 6158-59).

* * *

Purpose to kill is an element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the minds of the defendants or co-defendants or aiders and abettors, if you so find, a specific intention to kill the decedent Henry Podborny.

The Court in order to assist you in understanding the meaning of purpose or purposeful herein would give you this kind of special - will give you this instruction. Wherein the evidence may disclose the existence of complicity by way of an aider and abettor or a conspiracy, the law of the state of Ohio is as follows: As state in the leading case in the matter where you have an unlawful act contemplated in the original conspiracy, although not identical with or similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was performed was reasonable or likely to produce the death of another, then each conspirator, or aider and abettor is equally guilty as the principal offender of the homicide.

Although such conspirator, or aider and abettor as a conspirator was neither present [n]or had knowledge of the physical killing, or the weapon used.

Now, a person acts purposely when the gist of the offense is a prohibition of conduct against a certain nature regardless of what the offender intended to accomplish. Therefore, if it is the specific intention and purpose to engage in an act of that nature, then the specific conduct or objective in producing a certain act results or engaged at the time specific conduct to do an act. Purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

(Tr. 6159-61).

* * *

Now, if a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life and to inflict great bodily harm, the

purpose to, intent to kill may be inferred from the use of the weapon.

(Tr. 6161).

* * *

Now, ladies and gentlemen, the Court will continue to define the various elements and I will define purpose again to robbery and kidnapping in a few moments. Being aggravated robbery and kidnapping, having the elements of purpose, now prior calculation and design is an essential element of the crime of aggravated murder.

Prior calculation and design means that the purpose to kill was reached by the defendants through a definite process of reasoning in advance of the killing, which process of reason must have included a little plan involving a study consideration of the method, the means or the instrument which kills another or a weapon used to kill another.

No definite period of time must have elapsed, or no particular amount of consideration must be given to the prior calculation and design to kill, but acting on the spur of the moment or after monetary consideration of the purpose to kill is not sufficient to constitute the crime of prior calculation and design -- strike that. Constitute the crime prior calculation, or the prior calculation and design needed to meet the element required for aggravated murder.

If you find from the evidence that the defendant or the co-conspirators, co-conspirator, either individually or co-conspirators, or aider and abettor were actually performing the act to kill and this purpose was arrived at with prior calculation and design before he or she performed the act, that is sufficient for this element of the crime of aggravated murder.

(Tr. 6162-63).

* * *

The Court would indicate at this time in this particular case we

have multiple defendants. We have three. And we discussed separating the question of guilt or innocence with each one of these defendants. You must separately consider the elements applicable to each one of the defendants as he or she were separately tried and you must separate it in your finding, as I will explain, to each defendant. You must state your finding to each count separately, also, and to each defendant uninfluenced by the verdict as it relates to the other defendants.

The counts, three separate counts, have to be considered separately. The defendants, each and every one of them, may be found guilty or not guilty as to any one or all of the charges set forth in the indictment.

(Tr. 6165).

* * *

"No person in attempting or committing a theft offense as defined in Section 2913.01 of the Ohio Revised Code, or in fleeing immediately after such offense, or offenses, shall do either of the following - - " And I have paraphrased this, either have a deadly weapon or dangerous ordinance as defined under 2923.11 on or about his person or under his control or in the alternative, inflict or attempt to inflict serious physical harm on another.

The elements briefly, from the definitions are that these defendants, or co-conspirators, or one which you find to be an aider and abettor, inflicts serious harm or attempts to inflict serious harm on another, or in the alternative that the defendant has a deadly weapon or dangerous ordnance on or about his person or under his control and that the defendant was either, in either case, was committing or attempting to commit a theft offense, or anything immediately thereafter of a felony, normally the Court would indicate that the defendants are charged with aggravated robbery.

And before you can find the defendants guilty, you must find beyond a reasonable doubt that on or about the 29th day of January, 1981, here in Cuyahoga County, that the defendants or an aider and

abettor or co-conspirator, did obtain or attempt to obtain property of some value, however small, for the purpose of depriving Henry Podborny of that property and the defendant had a deadly weapon or dangerous ordnance on or about his or her person or under her control. Or in the alternative, you will consider the alternative of serious physical harm, that is the defendants inflicted serious harm upon the person of Henry Podborny.

Now, those are the elements of aggravated robbery conspired in this case.

Now, purpose again is an essential element of the crime of aggravated robbery. Purpose to deprive the owner of his property and to obtain the property is an essential element of aggravated robbery. And once again a purposeful act, purposely is the specific intention to obtain certain results. And in this case it must be established at the time in question there was intent in the mind of the defendants and/or co-conspirators, or aiders and abettors in complicity, a specific contention to obtain the property of Henry Podborny.

Now to determine the purpose from which the person acts, does an act or brings about a specific result, is determined by the manner in which it is done, the means or weapon used and the weapon used and all other facts and circumstances in evidence. As to the issue -- as to the issue, rather, of a deadly weapon or dangerous ordnance, a deadly weapon, I have explained it one way. There is another way to explain it.

(Tr. 6165-68).

* * *

Deadly weapon is an object or instrument also of such size and weight and of such design and shape that it may be grasped in the hand in such a way that it may be used upon or directed against the body of another in a manner with such force to injure or kill the other -- another person.

(Tr. 6168-69).

* * *

In conclusion, the Court would indicate to you as it relates to count number two, aggravated robbery. If you find that the State of Ohio has proven each and every essential element of the crime of aggravated robbery as against the defendants, those who you find as co-conspirators, or aider and abettor, in that on January 29th, you found that they did unlawfully and purposely did in attempting to commit a theft offense as defined in 2913.01 and a theft offense, robbery is a theft offense, stealing is a theft offense.

In committing a theft offense, or in attempting to commit, fleeing thereafter, such offense upon Henry Podborny the defendants did have a deadly weapon or dangerous ordnance, to wit, a gun as alleged in the indictment, a gun on or about his person or under their control or if you find beyond a reasonable doubt in the alternative that on or about the 29th day of January, the defendants or co-conspirators or aiders and abettors or persons acting in concert with them unlawfully and purposely in attempting to commit a theft offense or in fleeing immediately after such attempt or offense upon Henry Podborny did inflict or attempt to inflict serious physical harm upon Henry Podborny then you should find the defendants guilty in the aggravated robbery, second count.

(Tr. 6170-71).

* * *

Now, the third count in this case involving kidnapping under 2905.01. And that statute reads as follows:

"No person by force, threat or deception or by any means shall remove another from the place where he is found, or restrain him of his liberty for any of the following purposes," and the purposes alleged in this statute that are alleged in the indictment are as follows: To facilitate the commission of any physical, any or, flight thereafter. That's under two of the statute.

Three, to terrorize or inflict serious harm on the victim or another. Therefore, you have these several elements as follows, it wit, one, that the defendant removes another, defendants, and when I say defendants I'm talking also about co-conspirators and aider and abettors, the defendants removed another from a place where he is found. And the defendants restrained another of his liberty and, two, that the means of removal or restraint is by either force, threat or deception. And, three, that the defendants purpose is to facilitate the commission of any felony or flight after the commission of a felony or in the alternative it is an either-or situation, again, is to terrorize the victim or to inflict serious physical harm to the victim.

That's the short form. I believe short-long all the way through here because that's the short form of what the State has to prove under the kidnapping statute before you can find the defendants herein, that is Gail Robert O'Neal, Lawrence O'Neal, Lloyd G. Allen, Dimple Podborny, guilty of kidnapping of Henry Podborny, you must find that beyond a reasonable doubt that on or about the 29th day of January, 1981, and in Cuyahoga County, Ohio, that the defendant, co-defendants, conspirators, rather aider and abettors, in complicity removed Henry Podborny from the place where he was found or restrained Henry Podborny of his liberty for the purpose of facilitating the commission of a felony or flight thereafter or in the alternative terrorize him or in the alternative to inflict serious physical harm on Henry Podborny and that such acts were accomplished by force, threat or deception.

That's if you find beyond a reasonable doubt in respect to Henry Podborny that he was removed from the place where he was found or restrained from liberty for the purpose of facilitating a felony or flight thereafter, or in the alternative to terrorize or separate, alternate to inflict serious harm to a defendant and that such removal was accomplished either by force, threat of force, deception then the defendants would be guilty of kidnapping under 2905.01.

On the other hand, if the State failed to prove any one of these essential elements of the crime of kidnapping, I repeat it, then you would find them not guilty.

(Tr. 6171-74).

* * *

Therefore, you have to determine these facts from the facts and circumstances in evidence. Whether or not the defendants or co-conspirators or aiders and abettors had the purpose in mind, either to commit a felony or facilitate the flight from the commission of a felony, or to otherwise have the purpose in mind to terrorize Henry Podborny, or otherwise had the purpose in mind to inflict serious harm on Henry Podborny, such as injury or death.

Now, in conclusion as it relates to kidnapping, if you find every essential element of kidnapping, that is the defendant, co-conspirators or person in concert or aider and abettors, did unlawfully and by force, threat or deception remove Henry Podborny from the place where he was found and restrained him of his liberty for the purpose of facilitating a felony, or flight thereafter, or in the alternative that they did for terrorizing or in the alternative for inflicting serious harm on Henry Podborny and failed to release him, the victim, in a safe place unharmed, then you must find the defendants guilty as charged in the indictment.

(Tr. 6176-77).

* * *

Now, ladies and gentlemen, I have indicated earlier that I would explain what is meant by conspiracy, aiding and abetting and complicity in this case. You will be called upon to decide from the evidence whether or not the State of Ohio has proven a conspiracy beyond a reasonable doubt among the defendants and the other co-conspirators. The Court would appoint out that the defendants have not been charged in this indictment under our conspiracy statute 2923.01, but have been charged in this particular case, the State of Ohio, theory of the case appears to be buttressed to their aiding and abetting or conspiracy. The central issue of concern is as follows, one, has the State proven an

agreement, a scheme or plan that was participated in by the defendants in this particular case, in a conspiracy intent, the element of the offense, conspiracy, is however more complex because it involved two elements of intent that shade with each other, each party, must have intended to enter into the agreement and scheme and they must have a common intent to commit an unlawful act.

Second issue, factual issue for you is whether or not the State has proven there was a concerted action by and between the defendants, or with other indicted or other unindicted co-conspirators. This you have to determine from the evidence.

Three, whether or not the defendants herein, either or all of them, or some or none of them, have aided or adjoined, aider or abettor, or joined in, in a conspiracy or existing conspiracy. To this extent the Court would indicate that the conspirator rule applies, if four conditions are established, one, that there is an attempt between the parties, two, that the particular defendants participation in the conspiracy, that is the defendants intended to commit and engage in criminal activity and, three, that the particular defendants participation was performed during the course of the conspiracy and, four, that the particular defendants participation was inference of the conspiracy, that is, there was a substantial overt act committed in furtherance of an illegal purpose.

Now, you should consider further whether or not the State has proven that each one of these defendants, that is Robert O'Neal, Lloyd B. Allen and Dimple Podborny, engaged in a conspiracy by committing an overt act in furtherance of an agreement between them, with the Court now defines and tells you what an overt substantially -- tells you about that.

What is a substantial overt act in furtherance of a conspiracy? An overt act is substantially when it is of such character as to manifest a purpose on the part of the actor, in this case, the defendants, that is any of these defendants, that the objective of the conspiracy should be completed. Conspiracy, ladies and gentlemen, is the plan or aiding in or planning with other, or agreeing with another person that one or more

of them will engage in a conduct with the purpose to commit or facilitate and/or promote the commission of a specific offense.

Therefore, a conspiracy is an undertaking or an agreement by one or more persons to carry out a common objective to commit, promote, or to facilitate a criminal act.

The existence of undertaking or agreement may be shown either by that direct evidence or by inferences from facts or circumstances in evidence, that is circumstantial evidence. Now the reason for the use of facts and circumstances and inferences, probably has been gathered from the facts that conspirators usually and generally are not open. And conspirators usually don't meet in one place and at one time.

There are various stages of a crime. There is a planning stage, there is a perpetrator who may require him before the crime to assist in planning it during the course of the crime until activity to aid in the commission of it, or in escaping from the scene, or after the defendants completed it or conceal or assist in evading answers, or protect or concealment of loot and the evidence against them.

Therefore, conspiracies are not really easily identifiable and hence the use of inferences and circumstantial evidence is allowed. Those who associate to perform the criminal act or know or share the objective and participate to some extent are bound by the acts of anyone, any one of their number, in carrying out the purpose of the conspiracy.

You may not consider the acts and statements of anyone against another unless the existence of the agreement and understanding to commit the criminal act is substantiated by the state beyond a reasonable doubt. The defendant cannot be convicted of a conspiracy unless substantial overact in the furtherance of the conspiracy is proved that -- pardon me. Is proved to have been done by he or she, or by a person with whom he or she conspired and that such act was performed subsequent to the defendant's entrance into the conspiracy.

An overt act is substantial when it is of such character to manifest the purpose on the part of the actor, that is, the defendant, that the object

of the conspiracy can be completed.

As to unidentified co-conspirators, or co-confidants, the Court would indicate that if the defendants know, or had reasonable cause to believe that a person with whom he or she converses, or has also conspired or was conspired with another person to commit the same offense, then that defendant is guilty of conspiring with such other person who's either co-conspirator or aider and abettor even though the identity of the other person was unknown to the defendants O'Neal and Allen and Podborny.

Ladies and gentlemen, a co-conspiracy terminates when the offense or offenses are committed, or when it is abandoned by all conspirators. A conspiracy remains in existence during such a period as the conspirators are concerned with the concealment of their criminal conduct as I have indicated earlier, as the testimony of the conspirator. The law of the State of Ohio is that no person shall be convicted on a conspirator's testimony unsupported by other evidence.

The Court will speak further on this matter at length.

The Court has mentioned the word complicity. Conspiracy and complicity are two separate and distinct legal theories.

Also complicity a person who aids or abets in conspiracy can be a co-conspirator, complicity in law means the conduct of one who purposely participates with another as a partner or accomplice for the purpose of committing a crime. The laws in Ohio on aiding and abetting or complicity is that a person who knowingly aids or assists another in the commission of a crime is just as guilty as if he personally performed every act constituting the crime.

I'm speaking of aiding and abetting now. When two or more principals have a common purpose to commit a crime and one does one part and the second performs the other part, those acting together are equally guilty of the crime.

Further, where two or more persons have a common purpose to

commit a crime and wherein a continuing sequence over events other crimes are committed, all of the persons are responsible for all of the crimes that happen in the continuous sequence of the events even though all of said persons were not physically present when the other crimes were committed.

This is the law in aiding and abetting or in complicity.

The mere fact that a person, as the same law, as aiding and abetting, the mere fact that a person is present when a criminal act is presented does not make him an aider and abettor unless he does some overt act in furtherance of the crime charged in the indictment.

Now, such persons under the law of complicity as distinguished from co-conspirators, such persons are regarded as if they were the principal offender and are just as guilty as if he or she performed each act constituting the offense. This is true even though they weren't physically present when the act was performed.

It is the law of Ohio when two or three persons have a common purpose to commit a crime and one does a part and second does another act, together those acting together with the purpose required for the commission of a crime, that is the purpose required for aggravated murder, aggravated robbery and kidnapping as it relates in this case, are equally guilty of the crime. And the Court instructs you as a matter of law in Ohio that an aider and abettor can be also found as to be a co-conspirator.

The Court has instructed you as to the offense of aggravated murder, aggravated robbery and kidnapping. Further -- period. Okay.

Further you will decide whether or not in this case the defendants assisted, or encouraged or directed or associated themselves with one another for the purpose of committing those offenses respectfully by, or consideration of the evidence.

Again, once again a person cannot be convicted -- rather, no person can be convicted of these offenses, aiding and abetting, solely on

the testimony of conspirators, solely on the testimony of accomplices unsupported by other evidence.

The Ohio Rules require even in conspiracy as well as the declarant that the defendants participation must be established upon independent proof of the conspiracy, such corroboration must come from evidence in the case aside from the testimony of her co-conspirators.

This consideration applies even with regard to the proof of the existence of the alleged conspiracy.

Corroborative evidence is evidence of some act or fact related to the offense, which if believed by itself and without any aid, interpretation or direction from the testimony of a co-conspirator then connects the defendant to the commission of the offense charged. It is not, however, necessary that the corroborative evidence be such in itself to establish every element of the offense charged now, and that it corroborate every fact to which a co-conspirator testifies.

Mere similarity of conduct among the various persons and the fact that they have been associated with each other and may have assembled together and discussed common aims and interest does not necessarily establish proof of the existence of the conspiracy. However, in this case the evidence in this case need not show that the member of the conspiracy entered into any express or formal agreement, or that they directly by words spoken, or in writing, stated between themselves with the objective or purpose was to be, or details thereof, or expressed means by which the means of the objective or purpose was to be accomplished.

What the evidence in this case must show though beyond a reasonable doubt in order to establish proof that a conspiracy existed, is that the member of the conspiracy in some way or manner and through some contrivance positively, or tacitly, orally, written, expressly or impliedly, confederated, together, combined and agreed, that is, came to a mutual understanding to try to accomplish a common and unlawful crime.

The evidence in this case must establish beyond a reasonable doubt

that the alleged conspiracy was purposely formed and each defendant here and purposely joined and participated in the plan intended in advance and further some object or some conspiracy in which one may become a member of a conspiracy without full knowledge of the detail to have a conspiracy.

On the other hand, a person who has not knowledge of the conspiracy, but has to ac tin a way which further some object or purpose of the conspiracy, thus not thereby become a conspirator. To act or participate purposely means to act or participate voluntarily and intentionally in an unlawful enterprise and with the special intent to do something that the law forbids because of a certain unlawful result which was the subject of the agreement.

Thus, if any of the defendants purposely agreed to enter into a conspiracy, or joint venture to accomplish an unlawful objective, if you find that such defendants were co-conspirators or aider and abettors in complicity and in a substantial overt act in furtherance of an alleged conspiracy is proven beyond a reasonable doubt to have been done by this person, by him or her, and/or by a person or by a person with whom he conspires and that such act was performed subsequent to the entry of the defendant into the conspiracy, such defendant properly should be considered a co-conspirator.

An overt act is substantially, once again, when it is of such a character as to show a purpose on the part of the actor that the objective of the conspiracy should be completed. An overt act is any act purposely committed by one of the conspirators, or co-conspirators an effort to accomplish some objective or purpose of the conspirator -- conspiracy. An overt act need not be criminal in nature if conspired separately and apart from the conspiracy. It may be an act which taken alone by itself is innocent. It must, however, be an act which follows, intends towards the accomplishment of the plan or scheme. It must be purposely done in furtherance of some object or purpose of the conspiracy.

If it is established beyond a reasonable doubt that a conspiracy existed in this case, an act, a declaration, then the acts and declarations of any of the co-conspirators are chargeable against any -- are

chargeable against and may be considered with respect to each other co-conspirator with respect to each other co-conspirator as though the act of declaration was such -- was made by co-conspirator -- strike that -- the word I think I have -- Let's take that over.

If it is established beyond a reasonable doubt that a conspiracy existed, the act or declaration of a co-conspirator are chargeable against and may be considered with respect to each of the co-conspirators as though it was the act or declaration of such co-conspirators. Each co-conspirator act as an agent of the other.

The defendant cannot be bound by the acts or declarations of the other participant until it is established beyond a reasonable doubt that the conspiracy existed and that he was one of the members of the conspiracy.

Now, ladies and gentlemen, in conclusion the Court in summary would indicate that where two or more persons are associated in the same illegal purpose, any act or decision made by one of them with reference to the common objective and done, or said during the life of the conspiracy, may be given in evidence even where the indictment does not charge a conspiracy as such. A conspirator in effect is an agent for each of the other co-conspirators during the life of the conspiracy and as such any statements made or acts done by him in furtherance of the general plan and during the life of the conspiracy is admissible against the co-conspirator. And such declarations may also be testified by such person. And this is an exception to the so-called hearsay rule. It is not necessary that the conspirator be the one that commit the identical offense charged in the indictment or even a similar one. It is enough that the offense charged in the indictment was one that might have been contemplated as a result of the conspiracy.

And I made reference, when I started in the defining of purpose, I explained that during that course of defining purpose.

Finally, the Court would indicate that when an offender knows or has reason to believe, reasonable cause to believe to be with a person with whom he conspired and is also conspired with another to commit the

same offense, the offender is guilty of conspiring with such person even though that person's identity may be unknown to the offender.

Where two or more people enter into execution of a common criminal enterprise, what each does in the execution of the common purpose is the act of all, and if another crime is committed by one of them in attempting to accomplish the common criminal purpose, any one of them the aider and abettor in conspiracy with each other is guilty of the crime with the one who did the act if such crime was committed to accomplish common criminal purpose during the -- in furtherance during the time of the conspiracy. This is the law of Ohio.

These are matters, ladies and gentlemen, concerning aiding and abetting and conspiracy that you may consider and you may arrive at out of the evidence before you.

Now, before you can render a verdict of guilty on the main charges herein, that is aggravated murder, robbery -- aggravated robbery, and kidnapping, you must decide from the evidence beyond a reasonable doubt that the defendants either entered into a conspiracy as defined to you at length here, or in the alternative found to be aiders or abettors in complicity as found here, or have individually been proven guilty beyond a reasonable doubt by the State of Ohio of the charges before this Court, that is, aggravated murder, aggravated robbery, and kidnapping.

On the other hand, if the State failed to prove any one of the essential elements of those three crimes, statutory crimes, these defendants should be found not guilty.

Now, ladies and gentlemen, once again I will repeat in this particular case we have multiple counts and multiple persons being charged. If you find that the State has proven beyond a reasonable doubt all of the essential elements of any one or more of the crimes charged in the various counts of the indictment, then your verdict must be guilty as to such crime or crimes according to your finding. If you find, on the other hand, that the State has failed to prove beyond a reasonable doubt any one of the essential elements, or any one or more of the crimes charged in the separate count of the indictment, then your verdict must

be not guilty.

Once again, the charges as set forth in each count and the charges constitute separate and distinct matter, you must consider each count and the evidence applicable to each count separately and you must consider and separate your finding to each count uninfluenced by your verdict as to the other counts and other defendants. Each defendant may be guilty or not guilty, not guilty or guilty, of any one or all of the crimes charged.

As to the counts, you have multiple counts and you must decide as to the guilt and innocence of each one of these three defendants here as if they were tried separately and if you cannot agree on a verdict as to each -- all of the defendants, or you agree as to one or more, you must render your verdict as to that one or more whose guilt you agree on, or innocence you agree on. And you must separately consider the evidence applicable to each of the defendants as though there were three separate trials and consider your finding as to each defendant uninfluenced by your verdict as to the other defendant.

(Tr. 6177-95).

-END-

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COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 44551

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STATE OF OHIO,

PLAINTIFF-APPELLEE,

- VS -

ROBERT O'NEAL,

DEFENDANT-APPELLANT.

JOURNAL ENTRY
and
OPINION

FEE

JUL 25 1985

DATE OF ANNOUNCEMENT OF DECISION:

CHARACTER OF PROCEEDING: Criminal Appeal from the Common Pleas Court, Case No. CR-76350

JUDGMENT: Judgment affirmed.

DATE OF JOURNALIZATION: SEP 4 1985

APPEARANCES:

For Plaintiff-Appellee: John T. Corrigan, Prosecuting Attorney of Cuyahoga County, Ohio;
Carmen M. Marino,
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Cleveland, Ohio 44113

For Defendant-Appellant: Marillyn Fagan Damelio
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1276 West Third Street
Cleveland, Ohio 44113

EXHIBIT C

O'NEILL, P.J.

The appellant, Robert O'Neal, was indicted for aggravated murder, aggravated robbery and kidnapping. He came on for trial with co-defendants, Lloyd Allen and Dimple Podborny. At the conclusion of the trial, the jury returned guilty verdicts on all charges, not only for this appellant but for his two co-defendants. The appellant was sentenced to life and two 7-25 years sentences. A timely notice of appeal was filed with this court.

The first assignment of error complains that the appellant was denied a fair trial and his right to trial by a jury drawn from a representative cross-section of the community. When the State used its peremptory challenges to remove prospective jurors on the sole ground of group racial bias. The appellant brings to our attention the fact that the State, in the exercise of its peremptory challenges, excused seven blacks from the jury.

During the voir dire process, counsel for the appellant joined in a motion for mistrial and called to the court's attention that, out of six peremptories that the State had exercised, four black persons had been excused (Tr. 1237, 1240). After a short informal discussion, the court overruled the motion.

The essential nature of a peremptory challenge is that it is one exercised without a reason stated, without inquiry, and without being subject to the court's control. Lewis v. U.S., 146 U.S. 370, 378. The peremptory challenge is frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. Swain v. Alabama, 380 U.S. 202, 221. In discussing the purpose and use of the peremptory

challenge, the Swain court, at page 221, wrote "for the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is, in fact, partial, but whether one from a different group is less likely to be. It is well known that these factors are widely employed by both prosecutor and accused. Hence, veniremen are not always judged as individuals for the purpose of exercising peremptory challenges. Rather, they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations in the context of the case to be tried. With these considerations in mind, we cannot hold that the striking of negroes, in a particular case, is a denial of equal protection of law."

In concluding the discriminatory exclusion argument under peremptory challenges, the Swain court went on to hold "the presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not over-come and the prosecutor therefore subjected to examination by allegations that in the case at hand all negroes were removed from the jury or that they were removed because they were negroes." It is our conclusion that the expressions in the Swain case are totally applicable and dispositive of this assignment of error. The appellant agrees in his brief that the Swain burden has proved insurmountable and that he would not be able to comply with that burden. However, appellant goes on to argue that the method in which the prosecutor exercised his peremptory challenges denied the appellant his state constitutional and sixth amendment right to trial by a jury drawn from a representative cross-section of the community. In furtherance

of this assignment of error, the appellant calls our attention to Article 1, Sec. 5 and Sec. 10 of the Ohio Constitution. Section 5 provides that the right of a trial by jury shall be inviolate and Sec. 10 provides that the defendant was entitled to a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed. Apparently, the appellant would have us rule that in any criminal case, in which the defendant is a black person, the only impartial jury before whom he might be tried must be composed of a black majority. We can think of no intelligent reason to make such an assumption. Each of the twelve members of the jury chosen in this case, during the voir dire proceedings and as a part of their oath, promised that they would faithfully and impartially discharge their duties as jurors. This action, on the part of the jurors, raises an inalterable fact rather than a presumption. In the case of Taylor v. Louisiana, 42 L. Ed 2d 690, the United States Supreme Court concluded that a state constitution and statute, which systematically excluded women from jury duty, was unconstitutional and in violation of the Sixth Amendment for the reason that such a jury was not drawn from a fair cross-section of the community. In Taylor, the Supreme Court (p. 703) made a statement rather applicable to the case at hand. "It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community, we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." No charge is raised in this case that the selection of prospective jurors involved any patent discrimination. This first assignment of error is overruled.

Assignment of error number four is that during the examination of a police officer, the prosecutor asked the court to direct all parties to refrain from asking why appellant's gun had been initially confiscated by the East Cleveland Police Department. The court ordered all parties not to examine witnesses concerning why appellant's gun had been confiscated. The jury was to know only that it was returned to him on January 6, 1981.

Appellant's gun had initially been confiscated because he was involved in a homicide. As a result of that investigation, he was charged with voluntary manslaughter, but the charge was eventually dismissed. During cross-examination of the appellant, in spite of his previous order, the court permitted the prosecutor to extensively cross-examine the appellant about the details surrounding the manslaughter case. The appellant contends that this amounted to a violation of the order in limine and was also erroneously the admission of evidence of other crimes, wrongs or acts.

During direct examination, the appellant raised the issue of the East Cleveland incident. As a part of his testimony, he testified that he had received $6500.00 to buy a liquor license and that that money was eventually used to pay an attorney for a"little problem in East Cleveland with Judge Devinne to get the firearm back. He threw it out of court." He went on to testify that the gun which was returned to him was registered and that it was a crime in East Cleveland to have an unregistered gun. During examination by one of the other defense counsel, appellant stated that the gun had been taken from him on one day and returned the next day. The State argues that it was the appellant who opened the door on the East Cleveland incident and that it was deliberately done to convince the jury that

the appellant had a gun but that the gun was registered and that he would be a fool to kill anybody with a registered gun. The State further points out that when the appellant testified that the gun was returned to him, on the day after which it was seized, he was lying. The State had absolute knowledge that the gun was seized on June 5, 1980 and returned to the appellant on January 6, 1981. When one considers the record, it is obvious that the State, in their active cross-examination as to the East Cleveland incident, was primarily attempting to attack the credibility of the defendant-appellant, rather than attempting to bring to the jury's attention other acts of the defendant. In their introduction of testimony, it was necessary that the State bring to the attention of the jury that the appellant, as to the East Cleveland incident, was released from any charges brought therein. Reason would say that such evidence would do nothing to prove the character of the appellant in order to show that he acted in conformity therewith. It is more plausible to assume that the prosecution was conducting a cross-examination on a relevant matter affecting credibility, the door to which had been actively opened and pursued by the appellant himself. Accordingly, we find this assignment of error to be without merit.

The second assignment of error complains that the appellant was denied his constitutional right to a fair trial by the admission of gruesome, inflamatory photographs.

Initially, the appellant complains that the court erred in admitting, over objection, eighteen (18) photographs of the remains of the decedent taken by the coroner, and two (2) photographs depicting the decedent's remains located in a field. The court also, over

objection, permitted the introduction as exhibits of the actual clothes and various coverings which were found on the body. The court also allowed, over objection, the admission of a portion of skin removed from the appellant's finger and produced at trial in a liquid in a brown bottle. There is no argument as to the relevancy of these exhibits, but rather an argument that the court should have excluded some of them because their probative value outweighed the danger of prejudice.

The mere fact that a photograph is gruesome or horrendous is not sufficient to render it inadmissible if the trial court, in the exercise of its discretion, feels that it would prove useful to the jury. Evidence had been presented that,when the decedent's body was found, he had been dead for some weeks. State's exhibits 1(A) through 1(Q),being photographs of the decomposed remains of the decedent, are relevant and contribute to proof that the decedent had been dead for a prolonged period of time before his body was found. The piece of finger skin,removed from the decomposed remains, was used to establish the identification of the decedent. In the chain of evidence, the identifying finger skin was relevant to the decomposed remains. The decomposed remains were relevant to proof that the body had lain for a long time in a secret place. Perhaps the number of photographs (18 of the decomposed remains) was somewhat excessive, but we consider the importance of its relevancy to far-out way the danger of unfair prejudice or confusion. We reach the same conclusion as to the introduction of the decedent's clothing. As an additional point, we find that amongst this clothing there was also introduced some other articles which were strongly relevant and indicative of an attempt to hide the body and we find that this is

relevant to the case and not abusive. Over objection, the State also introduced a crow bar which was found in a bar owned and operated by the appellant, O'Neal. We can find no relevancy amongst the evidence which would connect this crow bar with the case. The prosecution argues that there was testimony that the decedent had been bludgeoned and shot and that perhaps this crow bar was used in that attack. We find this argument to be weak and conclude that the admission of this crow bar was erroneous. However, we do not conclude that, in view of all of the other evidence in the trial, that the admission of this exhibit was so prejudicial as to justify a reversal.

The third assignment of error complains that appellant was denied his right to a fair trial and his right to confront and cross-examine an adverse witness when the trial judge permitted an FBI agent to refuse to answer questions directed at him under cross-examination. Co-defendant, Dimple Podborney, subpoened and examined an FBI Agent, Graessle. The appellant attempted cross-examination of this witness, however, the witness refused to answer any questions and a United States Attorney explained to the court that the agent was not authorized to answer any questions posed by the appellant. In Volume 28 of the Code of Federal Regulations and especially at Sections 1621 et seq., a party desiring to secure information from an agent of the justice department may make application with the Attorney General of the United States, setting forth in said application the information which the party desires to elicit. It is then up to the justice department to decide whether such agent will be permitted to disclose the desired information. Further on under this chapter of the Federal Regulations, a procedure is set forth whereby a denial of such information may be administratively appealed.

This appellant had made no such application to the [redacted] Department. The United States Supreme Court has considered this regulation in the case of the United States of America ex rel Rodger Touhy v. Ragen, 340 U.S. 462, and concluded that such regulation is valid. The regulation does not prohibit nor preclude the disclosure of information by a government agent but rather regulates it and with good reason.

> "When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness indeed the necessity of centralizing determination * * * is obvious." United States of America ex rel Rodger Touhy v. Ragan, 340 U.S. 462, 467.

In the case at hand, the appellant could have but did not subpoena the FBI Agent. The appellant could have but did not submit the required application to the Justice Department. The appellant could have but did not request a continuance of the trial so that he could pursue the application requirement. In the case of United States v. Marino (C.A.6, 1981), 658 F. 2d 1120, the court concluded that the question of whether the procedure set forth in the Code of Federal Regulations denies a defendant a Sixth Amendment right to call and cross-examine witnesses is not reached until the defendants follow the procedures and then have their demands denied (p. 1125). Accordingly, we conclude that this assignment of error is without merit.

The fifth and sixth assignments of error complain that the appellant was denied a fair trial by the court's instructions on complicity and instructions on conspiracy when, in fact, the appellant was never charged with conspiracy.

During the conduct of the trial and especially during in-

structions, there were repeated references to and definitions [redacted] thereof in spite of the fact that the appellant was not charged with the statutory crimes of conspiracy and complicity. We have previously faced this same issue in the case of State of Ohio v. Dimple Podborny, (Cuyahoga County C.A. Case No. 44574) and State of Ohio v. Lola Gail Toney, (Cuyahoga County C.A. Case No. 44220). Our consensus in those two cases was that the State is not obliged to charge a defendant under R.C. 2923.01, where the substantive crime charged was committed as the result of a conspiracy. The conspiratorial conduct becomes the vehicle by which the crime is executed thereby making all the co-conspirators liable for the substantive crime. In further support of our conclusion, we draw attention to the case of the United States v. Hoffa (C.A. 6), 349 F. 2d 20. In Headnote 30 of that case, the Court of Appeals noted that "conspiracy may be shown as an evidentiary fact to prove participation in the substantive crime."

Accordingly, we find that assignments of error number five and six are without merit and the judgment of the trial court is affirmed.

Judgment affirmed.

JOURNALIZED SEP 4 1985

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COSTS TAXED.

ALL PARTIES.

It is ordered that appellee(s) recover of appellant(s) ..... its ..... costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

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*/ STILLMAN, J., dissents. See Dissenting Opinion.

*/ DONOFRIO, J., concurs.

PRESIDING JUDGE
*/ JOSEPH E. O'NEILL

*/ SITTING BY ASSIGNMENT:
SAUL G. STILLMAN, Ret'd. J. of the Eight Appellate District.
JOSEPH DONOFRIO, J. of the Seventh Appellate District.
JOSEPH E. O'NEILL, J. of the Seventh Appellate District.

BOOK 192 PAGE 65

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and the period for review will begin to run.

A-110

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 44551

STATE OF OHIO Plaintiff-Appellee -vs- ROBERT O'NEAL Defendant-Appellant	DISSENTING OPINION

DATE: JUL 25 1985
STILLMAN, J., DISSENTING:

For the reasons which I have indicated in my dissenting opinion in State of Ohio vs. Dimple Podborny, Court of Appeals Case No. 44574, I respectfully dissent in this case as well.

BOOK 192 PAGE 66

A-111

COUF OF APPEALS OF OHIO, EIGI DISTRICT
COUNTY OF CUYAHOGA

No. 44574

State of Ohio,
Plaintiff-Appellee

Vs.

Dimple Podborny,
Defendant-Appellant

DISSENTING
OPINION

JUL 30 1985
DATE

STILLMAN, J. DISSENTING:

I find it necessary, respectfully, to dissent from the majority in the light of State v. Henry, 4 O. St. 3d, 44 (1983) and the strict mandatory requirements of Criminal Rule 14 and R.C. 2945.20.

In Henry , the Supreme Court of Ohio declared that "where two or more persons are jointly indicted for aggravated murder, each of such persons shall be tried separately, unless the trial court orders a joint trial pursuant to the strict mandates set forth in Criminal Rule 14 and R.C. 2945.20."

Criminal Rule 14 recites in pertinent part:

> "When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately, unless the court orders the defendants to be tried jointly, upon application by the prosecuting attorney or one or more of the defendants, and for good cause shown."

R. C. 2945.20 provides:

> "When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately. The court, for good cause shown on application therefore by the prosecuting attorney or one or more of the defendants, may order said defendants to be tried jointly."

The record does not indicate any compliance with the requirements of Criminal Rule 14 and R. C. 2945.20.

The defendants, Robert O'Neal and four others, Gary Gabbard, Lola Toney, Dimple Podborny and Lloyd Allen were tried for aggravated murder and other offenses arising from the death of Henry Podborny. O'Neal was tried jointly with Dimple Podborny and Lloyd Allen. The remaining defendants were tried together in a separate trial. Counsel for O'Neal moved for a separate trial on two occasions prior to trial. The motions were overruled. The Prosecuting Attorney filed no motion for a joint trial.

Much as I deplo e the necessity for retrials, I am persuaded by the language of the Henry case that separate trials of the indicted individuals in the Podborny cases are mandated.

The entry filed in State v. O'Neal on September 23, 1981 recites, "Hearing had on Motion for Separate Trials; Evidence taken; Motion Denied . . ."

Footnote 4 of the Henry opinion at page 46 declares that the defendants "did not bear the burden of requesting separate trials" and the court reached the conclusion that ". . . because neither the state nor appellee Henry applied and sought affirmative approval for a joint trial for good cause shown pursuant to Crim. R. 14 and R.C. 2945.20, we . . . remand the cause for a new trial wherein Long will be tried separately." Any effort to validate the joint trials held here would require a gross distortion of the language in State v. Henry.

Moreover, the guilt by association inferences which are implicit in the Criminal Rule and Revised Code is reinforced dramatically by the manner in which this case was tried. The reference by the majority opinion to the character of two of the co-defendants as unworthy of trust underscores this consideration.

I also find merit in the eighth assignment of error which again demonstrates the validity of separate trial requirements in capital cases. If an individual defendant is to be convicted because of the mental state of co-defendants, the right to a fair trial and due process of law is seriously compromised.

For the reasons stated, I find that I cannot regard the failure of the prosecuting attorney to apply for a joint trial to be merely a procedural error. A capital case should be prosecuted in strict accordance with the applicable rules and the abuses concomitant with a joint trial were clearly evident in the case sub judice.

I, therefore, dissent.

Citation F.3d 820 (Table) FOUND DOCUMENT Database CTA Mode Page
UNPUBLISHED DISPOSITION
(CITE AS: 8 F.3D 820, 1993 WL 433317 (4TH CIR.(MD.)))

NOTICE: Fourth Circuit I.O.P. 36.6 states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Fourth Circuit.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Timothy Scott SHERMAN, Petitioner-Appellant,
v.
Sewall B. SMITH, Warden, Maryland Penitentiary; J. Joseph Curran, JR., Attorney General for the State of Maryland, Respondents-Appellees.
No. 92-6947.
United States Court of Appeals,
Fourth Circuit.
Argued: May 5, 1993.
Decided: October 27, 1993.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
D.Md.
VACATED AND REMANDED.
Andrew Lewis Frey, Mayer, Brown & Platt, Washington, D.C., for Appellant.
Ann Norman Bosse, Assistant Attorney General, Office of the Attorney General, Baltimore, Maryland, for Appellees.
Roy T. Englert, Jr., James G. Duncan, Mayer, Brown & Platt, Stuart H, Robinson, Bel Air,Maryland, Washington, D.C., for Appellant.
J. Joseph Curran, Jr., Attorney General of Maryland, Office of the Attorney General, Baltimore, Maryland, for Appellees.

Before PHILLIPS and MURNAGHAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

PER CURIAM:

OPINION

**1 Timothy Sherman was convicted of murdering his parents and currently is incarcerated in the Maryland Penitentiary in Baltimore. On petition for a writ of habeas corpus, he has challenged his conviction on the ground that his constitutional rights were violated by a juror's unauthorized and unsupervised visit during his trial to the crime scene. Upon the district court's denial of a writ, Sherman filed a timely notice of appeal.

At approximately one o'clock in the morning of October 12, 1987, Ann and Stevenson Sherman were murdered in their sleep, each killed by a single shotgun blast. Eighteen-year-old Timothy Sherman, Ann's natural son and Stevenson's adopted son, reported that he had been in bed when he heard a single shotgun blast, his mother's screams, and then another shotgun blast followed by silence. He ran to the nearby house of his maternal grandfather, William Gibson, arriving at approximately 1:30 a.m. Gibson testified that"Timmy" was

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"very much out of breath and upset," that he had been crying, and that it took some time for him to calm down enough to explain what had happened. The two returned to the Shermans' house, where Gibson entered Ann and Stevenson Sherman's bedroom and discovered that they were dead. Gibson told his grandson that his parents were dead, causing him to cry again. The grandfather then called other family members and the police. Almost immediately the house filled with people-paramedics, police, family, and even the press.

In their investigation on the day of the murder, the police made two discoveries which were to be the basis of the State's case charging Timothy Sherman with the murder of his parents. First, two deputies, with the aid of a trained dog, found a Stevens 12-gauge shotgun that belonged to the Shermans tightly lodged in a pine tree near the grandparents' house. An examination of the weapon revealed that it had fired the two shells found in the hallway outside Ann and Stevenson Sherman's bedroom. Additionally, a fingerprint on the weapon matched that of Timothy. At trial, the prosecution theorized that the location of the weapon pointed toward Timothy's guilt as he had once used the tree as a hiding place.

The second piece of evidence introduced by the prosecution against Timothy was a box of Remington 12-gauge shotgun shells which was found under the mattress of Timothy's bed. The box, which was designed to hold five shotgun shells, contained three shells that matched the two expended shells found outside the victims' bedroom.

Those two pieces of evidence represented the case against Timothy. The State did not introduce any evidence of motive. In addition, two tests of Timothy's hands for gunpowder residue-one a highly sophisticated neutron activation test-which were taken only hours after the shooting failed to reveal any evidence to support the State's case. Likewise, his clothes tested negative for gunpowder residue and no blood was found on any of his clothes, on his person, or in his bedroom. The lack of gunpowder residue was especially notable because a heavy accumulation of residue was found in Timothy's parents' bedroom.

**2 Timothy also has noted weaknesses in the two pieces of circumstantial evidence which the prosecution relied upon. The State introduced nothing besides the location of the box of shells to establish that it was Timothy Sherman who placed the box under his bed. The box was discovered after many people had been in the house, and thus it was theoretically possible that someone else placed it under Timothy's mattress. The police had not tested the box for fingerprints, so none were introduced.

The key evidence appeared to be the shotgun and its location. Regarding the presence of his prints on the murder weapon, Timothy previously reported to the investigating officers on the morning of the shooting that he had fired the gun the day before the murder, and an FBI fingerprint expert testified at trial that another person could have used the gun without leaving any prints or removing prints that had been left on the gun within the preceding days.

As to the location of the weapon, trial witnesses testified that the pine tree was a well-known neighborhood hiding place. More important, perhaps, was the testimony of the two police officers who removed the gun from the tree. Corporal Hopkins, a strong six-footer, testified that the shotgun was so forcefully lodged in the tree that he "would have had difficulty putting the gun inside the tree in the condition [he] found it." Hopkins weighed 210 pounds, Timothy Sherman 130. In addition, the investigating officers

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discovered no evidence of pine needles or pine tar on Timothy the day after the murders.

Less than one year after the murder of his parents, Timothy Sherman went on trial before a jury in Harford County, Maryland. In its case-in-chief, the prosecution presented extensive evidence describing and otherwise concerning the pine tree where the murder weapon was found and the surrounding property. The State sought to demonstrate that it was possible for Timothy to commit the murders, remove all traces of gunpowder from himself and his belongings, hide the shotgun in the tree, and run to his grandfather's house.

The State showed the jury a videotape of the outside of the Sherman house and the surrounding property, aerial photographs showing the relative locations of the Gibson house, the Sherman house, and the pine tree, several photographs of the tree, and testimony of both neighbors and police officers regarding the tree and the property. After the State had introduced most of that evidence and after the trial judge denied a motion by Timothy for a jury visit to the site, one member of the jury, unbeknownst to the trial court or the parties, decided to visit the neighborhood and inspect the site.

Juror Blane Miller revealed subsequent to the trial that a few days into the trial, he had driven, accompanied by his wife, "to the Sherman house and then [ ] drove back the streets from the Sherman house, back to the entrance of Gibson Manor in looking for a tree that was so involved in the case." Miller testified at a post-trial hearing that he had never been in that neighborhood before but had determined its location from the evidence presented at trial and that he found the tree but did not leave his car more closely to inspect it. He acknowledged, however, that as a juror he had received the jury handbook which instructed jurors not to speak with others regarding the case or consider evidence other than that presented in the court room. Although the state trial judge would not allow Miller to be questioned regarding either his reasons for visiting the site or the possible influence the site visit had on jury deliberations, Miller did indicate during the hearing that he inspected the scene because he wanted to see "the tree that was so much in question."

**3 At the conclusion of the trial, the jury convicted Timothy Sherman of two counts of first degree murder. Based on Miller's revelation, however, defense counsel made a motion for a new trial. Timothy Sherman argued to the trial court that the site visit by Miller violated his Sixth Amendment rights and justified a new trial. The state trial court when reviewing Sherman's challenge simply relied on its past ruling that a jury site visit was unnecessary and thereby concluded that any such visit was extraneous and irrelevant:

> I'm convinced that I denied the view, not because I felt that any significant information would come about, but I felt it would be a waste of time and expense to take the jury out there because I felt the issue was fully covered.

The state trial judge failed to make an independent determination or to require the prosecution to explain why the admittedly constitutional error was harmless. Instead, he simply placed the burden of proof on Sherman and relied on his own previous ruling without investigating whether the error was structural, i.e., one of law, or merely a trial error. See Sullivan v. Louisiana, 113 S.Ct. 2078, 2082-83 (1993). The trial court then sentenced Timothy Sherman to two consecutive terms of life imprisonment.

On its direct review of Sherman's conviction, the Maryland Court of Special

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Appeals deferred to the trial judge's discretion. In addition, that court also assumed the burden of proof was on Sherman: "Sherman's bald averment fails to indicate how the juror's improper action prejudiced the case." The Court of Special Appeals of Maryland upheld the conviction.

Both the Maryland Court of Appeals and the United States Supreme Court denied Timothy Sherman's requests for a writ of certiorari, although Justices White and Marshall would have granted cert. Having exhausted his post-conviction relief in the Maryland courts, Timothy Sherman sought a writ of habeas corpus from the United States District Court for the District of Maryland.

The district court referred the case to a magistrate judge who recommended that the writ not be granted. In his Report and Recommendation, the magistrate judge concluded, as an initial matter, that Sherman bore the burden of proving that the error was not harmless. Next, the magistrate judge, taking the position that Timothy had to meet the clearly erroneous standard, accepted the state court's conclusion that Sherman failed to prove that the juror's site visit was not harmless. The district judge, in a one-page memorandum and order, adopted the magistrate judge's report.

The district court relied also on answers to questions which had not actually been investigated. It, therefore, may have imposed an improper standard of review on Timothy with regard to the state court's determination of harmlessness and may improperly have placed the burden of showing the error was not harmless on the defendant. The Supreme Court has ruled consistently that habeas courts must review the entire record de novo in determining whether a trial error affecting substantial rights influenced jury deliberations and that the burden of showing harmlessness rests with the state. See Kotteakos v. United States, 328 U.S. 750 (1946).

**4 Recently, the Supreme Court employed de novo review in a case in which it concluded that Kotteakos governed federal habeas corpus determinations of whether constitutional error of trial type was harmless. Brecht v. Abrahamson, U.S., 113 S.Ct. 1710 (1993); see also Wright v. West, U.S. # 6D 6D6D6D# ,, 112 S.Ct. 2482, 24922493 (1992) (engaging in de novo review); Chapman v. California, 386 U.S. 18, 24 (1967). Therefore, perhaps, the district court, in reviewing Sherman's constitutional challenge, should have first decided whether the question was one of law, i.e., subject to de novo review. See also United States v. Thompson, 744 F.2d 1065, 1068 (4th Cir. 1984) (reviewing de novo an alleged violation of right to an impartial jury).

The Supreme Court also held in Kotteakos that burden of proof is on prosecutors to explain why trial errors were harmless. Justice Rutledge, writing for the Court, plainly states that unless an error is merely "technical", the burden of sustaining a verdict by demonstrating that the error was harmless rests on the prosecution. Kotteakos, 328 U.S. at 760-761. Here, there has been no decision as to whether or not the error was merely technical. As Justice Stevens notes in his concurrence in Brecht, "[a] constitutional violation, of course, would never fall in [Rutledge's] 'technical' category." Brecht, U.S. at, 113 S.Ct. at 1723-1724 (Stevens, J. concurring).

Because the district court erred in not reviewing the entire record de novo to answer questions as to the nature of the error-structural or trial-and whether it was technical or not, and, depending on the answers to those queries,

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whether the error influenced the jury's deliberations, with the burden on prosecutors to explain why trial errors were harmless, we vacate the district court's order and remand for further findings in accord with Kotteakos .

VACATED AND REMANDED

PHILLIPS, Circuit Judge, concurring in part and concurring in the judgment:

I agree with the majority that a state court's finding that a federal constitutional error is harmless is not a "finding of fact" entitled to a presumption of correctness on federal habeas review under 28 U.S.C. s 2254(d); that, instead, the issue of harmlessness is a mixed question of law and fact reviewable de novo on federal habeas. See Dickson v. Sullivan, 849 F.2d 403, 405 (9th Cir. 1981); United States ex rel. Savory v. Lane, 832 F.2d 1011, 1018 (7th Cir. 1987); Lacy v. Gardino, 791 F.2d 980, 986 (1st Cir.), cert. denied, 479 U.S. 888 (1986); cf. Miller v. Fenton, 474 U.S. 104 (1985) ("voluntariness" of confession is a mixed question of law and fact entitled to de novo review on federal habeas); see also Wright v. West, 112 S.Ct. 2482, 2491-92 (1992) (declining invitation to overrule Miller and applys 2254(d) presumption of correctness to mixed questions of law and fact). I also agree that in denying habeas relief here, the magistrate judge failed to conduct a de novo inquiry into the harmlessness of the found Sixth Amendment error, but instead improperly deferred to the state court's prior determination that the error was harmless. Because I think that error alone merits our vacating and remanding here, I concur in the judgment.

**5 I write separately, however, because of doubt about the soundness of the majority's alternative holding that the State bears the burden of proving constitutional error harmless on federal habeas review. That surely has been the rule until recently, and it may still be. But the Supreme Court's recent decision in Brecht v. Abrahamson, 113 S.Ct. 1710 (1993), casts enough doubt on its continued validity that I think we should simply stay away from it as an alternative ground of decision.

The principal issue in Brecht was what standard should be used to decide whether constitutional error may be disregarded as harmless on federal habeas: the stringent standard of Chapman v. California, 386 U.S. 18, 24 (1967) (error is harmless only if reviewing court can say, "beyond a reasonable doubt," that the error "did not contribute to the verdict obtained"), or the relatively more forgiving standard of Kotteakos v. United States, 328 U.S. 750, 776 (1946) (error is harmless unless reviewing court can say that it "had a substantial and injurious effect or influence in determining the jury's verdict"). The Court held that while the Chapman standard applies to most constitutional errors on direct review, the more lenient Kotteakos standard should apply to those same errors on federal habeas review, because it is "better tailored to the nature and purpose of collateral review and more likely to promote the considerations underlying this Court's recent habeas jurisprudence." Id. at 1722.

The majority here assumes that in adopting Kotteakos 's harmlessness standard for use in federal collateral review, the Brecht Court also intended to adopt Kotteakos 's separate holding that the burden of proving a particular error harmless under that standard rests with the State. Slip op. at 6. With all respect, I am not so sure that Brecht can be read to do this. It is true that the Brecht majority did not specifically consider the question of who bore the burden of proof with respect to harmlessness on

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federal habeas. But Chief Justice Rehnquist, writing for a majority of five, used language that strongly suggested the Court intended to place that burden on the habeas petitioner, rather than the State. See 113 S.Ct. at 1722 (under the newly-adopted Kotteakos standard, "habeas petitioners ... are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.' ") (emphasis added). Three of the four dissenters specifically read that language as a deliberate re-casting of the burden of proof with respect to harmlessness from the State to the habeas petitioner. See 113 S.Ct. at 1735, 1727 (White, J., joined by Justice Blackmun and by Justice Souter, in relevant part, dissenting) ("the Court now invokes Kotteakos ... to impose on the defendant the burden of establishing that the error 'resulted in actual prejudice ' ") (emphasis added). Only Justice Stevens, who joined the Chief Justice's opinion for the Court but also wrote a separate concurring opinion, indicated that he understood the Court's adoption of the Kotteakos standard to leave the burden of showing harmlessness "on prosecutors." 113 S.Ct. at 1723 (Stevens, J., concurring).

**6 Because Justice Stevens provided the critical fifth vote to affirm the judgment below, I suppose we might read his concurrence as controlling on the burden-of-proof question. But I think this runs an unnecessary risk here, for several reasons. First, Justice Stevens also joined the majority opinion, with its contrary suggestions about the location of the burden of proof. Second, Justice Stevens' remark that the burden of proof would remain on prosecutors seems more one made in passing than an explicit expression of disagreement with the contrary intimations in the majority opinion. Finally, Justice White's reading, in dissent, of the majority opinion-as adopting a different rule on the cast of the burden of proof on harmlessness for federal habeas review than applies on direct review-is more consistent with the obvious design of recent decisions of the Court confining the scope of federal collateral relief and emphasizing that it is not automatically available simply because a petitioner has proved an error that might merit reversal on direct appeal. [FN1] For these reasons, I think that in prudence, whatever we may think of the rule, we should assume that the Brecht Court meant exactly what its majority opinionsaid: that the habeas petitioner has the burden of proving a constitutional error prejudicial-i.e., not harmless-under the Kotteakosstandard. [FN2]

Because I think it unwise and unnecessary to rest decision on the burden of proof point, the improper deference basis being sufficient,

I do not join those portions of the majority opinion discussing allocation of the burden of proof.

FN1. See, e.g., Teague v. Lane, 489 U.S. 288 (1989) (although new rules of law have retroactive application in criminal cases on direct review, they seldom do on federal habeas); Pennsylvania v. Finley, 481 U.S. 551 (1987) (although a criminal defendant has a constitutional right to counsel on direct appeal, he has no such right on federal habeas); United States v. Frady, 456 U.S. 152 (1982) (while the federal "plain error" rule applies in determining whether a defendant may raise a claim for the first time on direct appeal, the stricter "cause and prejudice" standard applies in determining whether that same claim may be raised on federal habeas); Stone v. Powell, 428 U.S. 465 (1976) (Mapp claims are not cognizable on

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federal habeas, even when they might merit reversal on direct review).

FN2. In this connection, it may be appropriate to note that under legislation currently pending in Congress, 28 U.S.C. s 2254(d) would be amended to make clear that the State bears the burden of persuading the court that constitutional error was harmless on federal collateral review. H.R. 3131, 103rd Cong., 1st Sess. s 303 (1993) (amending 28 U.S.C. s 2254(d) to add that on federal habeas, "[i]n the case of a violation that can be harmless, the State shall bear the burden of proving harmlessness").

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CASE NO. 93-7407

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

RESPONSE REQUESTED

ROBERT O'NEAL,

Petitioner,

v.

FRED McANINCH, WARDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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OPINION BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported at O'Neal v. Morris, 3 F.3d 143 (6th Cir. 1993) and is reproduced in the Appendix to Petitioner's certiorari petition at A-1. The entry of the Court of Appeals denying rehearing and rehearing en banc is reproduced in the Appendix to Petitioner's certiorari petition at A-8.

The judgment and opinion of the United States District Court

[1]Terry Morris, the original Respondent in this action, is no longer employed in the Chillicothe Correctional Institution. Fred McAninch, the current Warden of the Chillicothe Correctional Institution, is thus the proper Respondent in this action.

for the Southern District of Ohio, Western Division, is unreported and reproduced in the Appendix to Petitioner's certiorari petition at A-9. The Magistrate Judge's Supplemental Report and Recommendation is unreported and reproduced in the Appendix to Petitioner's certiorari petition at A-14. The district court's original remand order is unreported, and reproduced in the Appendix to Petitioner's certiorari petition at A-23. The Magistrate Judge's Report and Recommendation is unreported and reproduced in the Appendix to Petitioner's certiorari petition at A-28.

STATEMENT OF THE CASE

Respondent Fred McAninch (hereinafter Respondent) is the Warden of the Chillicothe Correctional Institute located in Chillicothe, Ohio. As the Warden, Respondent has custody of Petitioner Robert O'Neal, (hereinafter Petitioner). This custody is maintained pursuant to the journal entry of sentence issued by the Court of Common Pleas of Cuyahoga County in the case of State v. O'Neal, CR-163540 (CCP Cuy.Cty. 1981), wherein Petitioner was indicted and found guilty after a jury trial of one (1) count of aggravated murder in violation of Ohio Revised Code Section 2903.01, one (1) count of robbery in violation of Ohio Revised Code Section 2911.01,and one (1) count of kidnapping in violation of Ohio Revised Code Section 2905.01. Upon conviction the trial court sentenced Petitioner to consecutive terms of life imprisonment on the aggravated murder conviction, seven (7) years to twenty-five (25) years imprisonment on the aggravated robbery conviction and seven (7) years to twenty-five (25) years imprisonment on the kidnapping conviction.

Petitioner appealed the decision of the trial court to the Court of Appeals of Ohio for the Eighth Appellate District alleging through counsel the following assignments of error:

1. The appellant was denied a fair trial and his right to trial by a jury drawn from a representative cross-section of the community when the state used its preemptory challenges to remove prospective jurors on the sole ground of group racial bias.

2. The appellant was denied his constitutional right to a fair trial by the admission of gruesome, inflammatory photographs.

3. The appellant was denied his right to a fair trial and his right to confront and cross-examine an adverse witness when the trial judge permitted an FBI agent to refuse to answer questions directed at him under cross-examination.

4. The court erred in permitting the introduction of evidence of other crimes, wrongs or acts.

5. The appellant was denied a fair trial by the court's instructions on complicity and conspiracy.

6. Trial court erred in overruling the motion for separate trial.

On January 25, 1985, the Court of Appeals affirmed in all respects. A subsequent motion for leave to appeal was denied by the Ohio Supreme Court on January 29, 1986.

Petitioner filed an application for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 in the United States District Court for the Southern District of Ohio, Western Division, alleging the following grounds for relief:

1. Petitioner could not be jointly tried absent strict compliance with Criminal Rule 14 and O.R.C. §2945.20.

2. The prosecutor exercised his (preemptory) challenges to excuse jurors solely on the basis of their racial affiliation.

3. Petitioner was denied the right to a fair trial by improper jury instructions by the trial court.

4. Petitioner was denied the right to a fair trial and due process by continued reference to conspiracy and the trial court instruction on conspiracy.

5. Petitioner was denied due process and the right to a fair trial by deliberate prosecutorial misconduct.

6. Petitioner was denied his right to a fair trial and his right to confront and cross-examine an adverse witness.

7. Petitioner was deprived of his due process rights to a fair trial by the trial court allowing inflammatory physical evidence to be viewed by the jury.

8. Petitioner was denied equal protection of the law where the appellate court did not address an issue raised on appeal by Petitioner.

After the filing of extensive pleadings as well as an evidentiary hearing, and oral argument, the Magistrate Judge issued a Report and Recommendation on January 19, 1992. Respondent filed untimely objections to the Report and Recommendation on February 19, 1992. The district court thereafter granted a Petitioner motion to strike and remanded the case to the Magistrate Judge on the claims of constitutionally defective jury instructions, prosecutorial misconduct and erroneously admitted evidence.

The Magistrate Judge then filed a Supplemental Report and Recommendation which recommended granting the writ of habeas corpus. Although timely objections to the Magistrate Judge's Supplemental Report were thereafter filed, on June 26, 1992 the district court adopted the Magistrate Judge's Supplemental Report in its entirety and conditionally granted Petitioner's habeas corpus petition.

Respondent next obtained a stay of the district court's judgment and perfected a timely appeal to the Sixth Circuit Court of Appeals. On May 6, 1993, the Sixth Circuit issued a unanimous opinion reversing the district court's writ granting decision.

O'Neal v. Morris, 3 F.3d 143 (6th Cir. 1993). In so ruling the Sixth Circuit held that since all evidence upon which the jury could have relied pointed to Petitioner's guilt as a principal, error, if any, in the trial court's jury instructions was harmless. It is significant that the Sixth Circuit did not hold, as Petitioner mistakenly claims, "that the constitutional and nonconstitutional error findings made by the lower courts were correct." (Petitioner certiorari petition, p. 6). Indeed to the contrary, the Sixth Circuit explicitly recognized that the trial court's instructions were not error of any kind as it held:

> when read against the background of Ohio complicity law, the court's reference to "defendant's or co-defendant's or aiders and abettors" appears to be nothing more than an unartful boilerplace reiteration that the same individuals could be found guilty as either principals ("defendants or co-defendants") or as "aiders and abettors".

Id. at 146.

In response to the Sixth Circuit's decision, Petitioner filed a petition for rehearing with suggestion for en banc rehearing. The Sixth Circuit denied Petitioner's motion on October 4, 1993. Petitioner has now filed a timely petition for writ of certiorari in this Court.

STATEMENT OF THE FACTS

The plot to kill Henry Podborny, (hereinafter Henry) began as a confidence game to bleed money from Henry's wife, Dimple Podborny (hereinafter Dimple). In the spring of 1980, Dimple asked her daughter-in-law, Lola Gail Toney (hereinafter Toney) if Toney knew someone who could provide "protection" from Henry. (Tr. 1763). After meeting with Dimple in Chicago, Toney returned to Cleveland where she contacted her long time friend and business associate, James McLean. (Tr. 1764, 2946). Toney and McLean met three times and devised a plan to extort money from Dimple by charging her for "protection" from Henry. (Tr. 1769).

In June, 1980, Dimple met with Toney, McLean and another daughter at a Cleveland area Holiday Inn. Dimple agreed to a $5,000 protection fee of which she paid $2,500. In the months that followed, Toney and McLean concentrated on milking Dimple for "protection" money, rather than harming Henry. By mid-August, 1980, Dimple was anxious for results and approached Toney to arrange for Henry's killing. (Tr. 2952). Soon thereafter, Dimple paid Toney $24,600.

In August of 1980, Petitioner, who had known Toney over the previous eight years as a lover and part-time bookkeeper, entered the scheme. (Tr. 1750). Petitioner's job, for which Toney paid him $6,500, was to accompany Toney to Chicago to soothe Dimple's fears and convince her that plans for Henry's death were being made. (Tr. 1809, 1818, 1820). In the months that followed Petitioner and Toney were in constant contact. (Tr. 1823).

By January of 1981, Dimple had become very impatient. A plan was then devised to lure Henry to Cleveland, where Toney would drop him off at Petitioner's restaurant. Petitioner agreed to hold Henry while Toney and others went to Chicago and robbed Henry's residence.

On January 6, 1981, Petitioner received a .38 caliber Smith and Wesson gun which belonged to him and had been confiscated earlier in East Cleveland.[2] (Tr. 4051). Thereafter, on January 29, 1981, the robbery conspiracy proceed as planned and Toney took Henry to Petitioner's bar and drove down the block to a gas station as prearranged with Petitioner. (Tr. 1858). Approximately 10 minutes later, Petitioner arrived at Toney's car and gave her Henry's keys and wallet. (Tr. 1859). Petitioner and Toney drove up the block where they were met by another accomplice (Lloyd Allen) who informed them that he had hit Henry with a lead pipe so he couldn't run.

Henry was never seen alive again. His body was ultimately found on April 23, 1981. It was undisputed that Henry's death was caused by five blows to the head with a blunt instrument and a shot in the forehead. (Tr. 3710-3712).

Subsequent to Henry's murder, Toney, McLean and others attempted to get at Henry's assets. By February of 1981, however, McLean agreed to cooperate with the FBI who had earlier arrested

---

[2] Later tests confirmed that Henry was shot by a .38 caliber bullet. (Tr. 3893).

him. From March 17, 1981 through March 25, 1981, McLean, with the help of the FBI, taped several conversations with Toney in which they discussed Petitioner's extortion of money from Toney. (Tr. 1939, 3064, 3068, 3111). At the FBI's suggestion, McLean offered to help Toney get money. In a series of taped conversations, Toney and McLean arranged and delivered approximately $500 to Petitioner. (Tr. 1939).

On March 25-26, 1981, Toney, her brother Gary, Allen and Petitioner were arrested. Allen made a written statement which implicated Petitioner and himself in the kidnapping and robbery, but denied any involvement in Henry's death. (Tr. 4446, 4447, 4458-4461). After he was advised of his rights Petitioner made an oral statement similar to Allen's. (Tr. 4464, 4465).

Petitioner was further implicated in Henry's murder by admissions which he made to Wilbur Higgins during an April 2, 1981 Cuyahoga County Jail visit. Although it would be weeks before the police would find Henry's body, Petitioner confessed to Higgins that he and Allen had killed a man and placed the body in the field next to 1150 Lakeview. (Tr. 3724-3728). Petitioner then told Higgins to cover up the body. Despite Petitioner's request, Higgins did not go to the body until weeks later when he was accompanied by a city health inspector.

Higgins also testified that earlier that winter, Petitioner and Allen were parked within twelve feet of where Henry's body was found. At that time Petitioner told Higgins to leave for a while using the false excuse that they had women in the car. (Tr. 3733).

Petitioner's involvement in the killing of Henry was also demonstrated by evidence gleaned from Petitioner's bar. Linda Luke, trace evidence expert in the Cuyahoga County Coroner's Office, found blood splatters at Petitioner's bar on a mirrored panel and wooden paneling. (Tr. 3676). The blood splatters were consistent with Henry's blood type and enzyme make up. (Tr. 3684). Luke also used photographic enlargements to show the shape of the blood splatters. From these enlargements and a to-scale reconstruction of the paneling, it was determined that the blood splattered at a high velocity and at a height consistent with Henry's. Additionally, physical evidence found with Henry's body was similar to items found in Petitioner's bar. The pool table covering was missing from Petitioner's pool table and Henry's body was wrapped in green felt like covering. (Tr. 3665, 3701, 3712). Paint chips found on Henry's scalp hair were similar to paint in Petitioner's bar. (Tr. 3653).

At trial, Petitioner testified on his own behalf. While making no effort to explain the $500 which he had extorted from McLean, Petitioner characterized the $6,500 he received from Toney was an "investment." (Tr. 4840). On cross-examination, Petitioner admitted no loan papers had been signed and no liquor license papers involved Toney's name. (Tr. 4885-4886). The "investment" fell through and Petitioner used the $6,500 to pay attorney fees arising from a "little problem in East Cleveland with Judge Devine to get a [Smith and Wesson .38 caliber] firearm back." (Tr. 4845). Petitioner described his meetings with Dimple and Toney as social

occasions. (Tr. 4848, 4889).

Petitioner further testified the police roughed him up and falsely attributed oral statements to him. (Tr. 4863-4865). On cross-examination, Petitioner admitted the police never physically touched him. (Tr. 4872). Petitioner claimed that Toney, McLean and Higgins were liars and the statement made by Allen was a lie. (Tr. 4892, 4917, 4918, 4926).

ARGUMENT

I. NO CONFLICT CURRENTLY EXISTS AMONG THE CIRCUITS WITH RESPECT TO THE HARMLESS ERROR STANDARD THAT IS TO BE APPLIED IN FEDERAL HABEAS REVIEW.

In Brecht v. Abrahamson, ___ U.S. ___, 113 S. Ct. 1710 (1993), this Court recently held that a habeas corpus petitioner bears the burden of demonstrating that a trial court's error has substantial and injurious effect or influence in determining the jury's verdict such that it results in actual prejudice. In his brief Petitioner contends that a "conflict" exists because in Ordndorff v. Lockhart, 998 F.2d 1426 (8th Cir. 1993), the Eighth Circuit Court of Appeals applied the Chapman v. California, 386 U.S. 18 (1967) harmless error standard in a factually similar situation to the case at bar. However, even a cursory review of Ordndorff shows Petitioner to be in error.

In Orndorff a capital defendant discovered after he had pursued an appeal to the Arkansas Supreme Court that the key prosecution witness had been hypnotized prior to trial in an attempt to enhance her memory. For the sole reason that "the state courts did not have the opportunity to review the error at all" Id. at 1430, the Eighth Circuit applied the Chapman harmless error standard.

Unlike Orndorff, the above procedural summation of this case reflects that the Ohio appellate courts unanimously considered and rejected Petitioner's jury instruction claim on the merits. See, Appendix to Petitioner's Certiatori petition at A108 - A109. Under these circumstances no conflict whatsoever exists among the

circuits as to the appropriateness of the Brecht v. Abrahamson harmless error standard.

II. ALTHOUGH IT IS NOT DETERMINATIVE IN THE CASE AT BAR, BRECHT V. ABRAHAMSON PLACES THE BURDEN OF PROVING HARMLESS ERROR ON THE PETITIONER.

Petitioner next claims that there is a conflict within the Sixth and other circuits as to who has the burden of proving a constitutional error to be harmless.[3] In Brecht, this Court explicitly placed the burden of proving that a constitutional error was harmless upon the inmate as it held,

> The test under Kotteakos is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 328 U.S., at 776, 66 S.Ct., at 1253. Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice."

Brecht at 1722, emphasis added.

In its decision the Sixth Circuit recognized that the trial court's instruction "captured the essence of how a jury might properly infer an aider and abettor or conspirator's purpose to kill as explained by the Ohio Supreme Court." O'Neal at 146-147. As thus demonstrated, the Sixth Circuit's placement of the burden of proving harmless error upon Petitioner was not determinative to its decision. Furthermore it is unnecessary for this Court to

[3] Respondent notes in passing that a rehearing in banc, rather than this Court, is the proper means by which to settle a conflict within a circuit.

grant certiorari just to restate the burden of proving harmless error which it articulately set forth in Brecht. Petitioner's second argument for granting certiorari is meritless.

III. THE SIXTH CIRCUIT CORRECTLY APPLIED THE STANDARD OF REVIEW SET FORTH IN ESTELLE V. MCGUIRE, ____U.S.____, 112 S.Ct. 475 (1991) IN ITS EVALUATION OF PETITIONER'S INSTRUCTION CLAIM.

As his third ground for granting certiorari Petitioner complains that the Sixth Circuit retroactively applied Lockhart v. Fretwell, ____U.S. ___, 113 S.Ct. 838 (1993). The first problem with this argument is that the Sixth Circuit does not even mention Lockhart v. Fretwell, let alone use it as the basis of its holding that the district court had relied upon the wrong test for evaluating Petitioner's instruction claim.

Moreover, the Sixth Circuit's finding that the district court employed an outdated standard for evaluating Petitioner's instruction claim is eminently correct. As observed by the Sixth Circuit:

> The district court incorrectly relied upon the test espoused in Francis v. Franklin, 471 U.S. 307, 315-16 (1985), and Sandstrom, 442 U.S. at 514, and followed by this court in Clark v. Jago, 676 F.2d 1099, 1102 (6th Cir. 1982), cert. denied, 466 U.S. 977 (1984), that jury instructions infringe a defendant's due process rights if a reasonable jury could have interpreted the instruction as unconstitutionally shifting the burden of proof. However, after reviewing its sometimes inconsistent articulations of the test, the Surpeme Court settled on a single standard of review for jury instructions; "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way'

> that violates the Constitution." Estelle v. McGuire, 112 S.Ct. 475, 482 & n.4 (1991) (emphasis added) (quoting Boyde v. California, 494 U.S. 370, 380 (1990)).

O'Neal at 145. As thus demonstrated, unlike the district court which ignored this Court's Estelle v. McGuire dictates, the Sixth Circuit applied the correct standard of review for Petitioner's instruction claim. Petitioner's assertion that the Sixth Circuit retroactively applied the inappropriate standard of Lockhart v. Fretwell is both factually and legally incorrect.

IV. THE SIXTH CIRCUIT'S DECISION IS EXPLICITLY PREDICATED UPON A CAREFUL COLLECTIVE REVIEW OF PETITIONER'S CONSTITUTIONAL ALLEGATIONS.

Petitioner's final ground for certiorari contends that the Sixth Circuit failed to review his constitutional allegations collectively. Once again Petitioner appears to have misread the Sixth Circuit's decision which, in fact, considered and rejected Petitioner's assertion that the combined effect of trial "errors" constituted a "structual defect". Indeed, as reflected by the following, the Sixth Circuit explicitly held that Petitioner's constitutional allegations collectively asserted, at most, errors of state law which would not be actionable in federal habeas corpus:

> The district court also held that several rulings of the trial court on the admission of prejudicial evidence, together with the prosecutor's inflammatory closing remarks, deprived petitioner of a fundamentally fair trial. After a careful review of the record, we conclude that these errors were not of constitutional dimension, but were at most errors in the application of state law. As the decisions of both the Supreme Court and this circuit make clear, "federal habeas corpus relief does not lie for errors of state

> law" because "it is not the province of a federal habeas court to reexamine state court determines on state law questions." E.G., Estelle, 112 S.Ct. at 480; Walker v. Engle, 703 F.2d 959, 962 (6th Cir.), cert. denied, 464 U.S. 951 (1983). Under federal constitutional standards, the trial court's evidentiary rulings and the prosecutor's comments were not so prejudicial, either individually or in combination, that they rendered petitioner's trial fundamentally unfair.

O'Neal at 145. As thus reflected, Petitioner's habeas corpus allegations were accorded the precise collective review to which Petitioner feels they were entitled. Although Petitioner may be disappointed at the appellate court's rejection of these claims, the Sixth Circuit's opinion provides no support whatsoever for Petitioner's assertion that the consideration accorded his claims was constitutionally deficient. Petitioner's final ground for certiorari is therefore unworthy of this Court's attention.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner has failed to raise an issue deserving of review by this Court. Therefore, the petition for writ of certiorari must be denied.

Respectfully submitted,

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CASE NO. 93-7407

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROBERT O'NEAL,

Petitioner,

v.

FRED McANINCH, WARDEN,

Respondent.

On Petition For Writ Of Certiorari To The
United States Court of Appeals
For The Sixth Circuit

CERTIFICATE OF SERVICE

I, Timothy J. Mangan, counsel of record for respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 23rd day of February, 1994, I served a copy of Respondent's Brief In Opposition To Petition on each of the parties to this action by mailing such copy in duly addressed envelope, with first-class postage prepaid, to Thomas R. Wetterer, Jr., Assistant State Public Defender, Ohio Public Defender Commission, 8 East Long Street, 11th Floor, Columbus, Ohio 43215-3428.

TIMOTHY J. MANGAN
Assistant Attorney General

Attorney General
Lee Fisher

February 23, 1994

Clerk
Supreme Court of the United States
One First Street
Washington, D.C. 20543

Re: O'Neal v. Morris
Case No. 93-7407

Dear Sir:

Enclosed please find the original and twelve co Respondent's Brief in Opposition to Petition which is to with the Court in the above-captioned case.

Also enclosed is a cover page which we ask you to ti and return in the envelope provided.

Your assistance in this matter is greatly appreciate

Sincerely,

LEE FISHER
Attorney General

Stuart A. Cole

STUART A. COLE
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Criminal Justice Section
(614) 644-7233

SAC:dd
Enclosure

RE
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OFFICE
SUPER

No. 93-7407

Supreme Court, U.S.
FILED
MAY 19 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

ROBERT O'NEAL,

Petitioner,

vs.

FRED McANINCH, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

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Certiorari Granted April 4, 1994

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THE STATE OF OHIO

VS.

LELAND T. WARESS
GARY M. GABBARD
LLOYD G. ALLEN
ROBERT LAWRENCE O'NEAL
LOLA GAIL TONEY
DIMPLE PODBORNY

A TRUE BILL
INDICTMENT
FOR

AGGRAVATED MURDER R.C. 2903.01 W/CT

AGGRAVATED ROBBERY R.C. 2911.01 W/CT

KIDNAPPING R.C. 2905.01

DATE OF OFFENSE
On or about January 29th, 1981

THE TERM OF
JANUARY OF 1981

CASE NO. 163540 (Filed Mar. 27, 1981)

The State of Ohio,)
CUYAHOGA COUNTY) SS.
)

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely *and with prior calculation and design, caused the death of another, to-wit: Henry Podborny,*

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ Illegible
Foreman of the Grand Jury

/s/ John T. Corrigan
Prosecuting Attorney.

THE STATE OF OHIO

VS.

LELAND T. WARESS
GARY M. GABBARD
LLOYD G. ALLEN
ROBERT LAWRENCE O'NEAL
LOLA GAIL TONEY
DIMPLE PODBORNY

A TRUE BILL
INDICTMENT
FOR

AGGRAVATED ROBBERY R.C. 2911.01

DATE OF OFFENSE
On or about January 29th, 1981

THE TERM OF
JANUARY OF 1981

CASE NO.

The State of Ohio,)
CUYAHOGA COUNTY) SS.
)

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely did, in attempting or committing a theft offense, as defined in Section 2913.01 of the

Revised Code, or in fleeing immediately after such attempt or offense upon Henry Podborny, have a deadly weapon or dangerous ordnance, to-wit: iron bar, on or about their person or under their control

AND/OR

and in attempting or committing a theft offense as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense did inflict, or attempt to inflict serious physical harm on another, to-wit: Henry Podborny,

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ Illegible
Foreman of the Grand Jury

/s/ John T. Corrigan
Prosecuting Attorney.

THE STATE OF OHIO

VS.

LELAND T. WARESS
GARY M. GABBARD
LLOYD G. ALLEN
ROBERT LAWRENCE O'NEAL
LOLA GAIL TONEY
DIMPLE PODBORNY

A TRUE BILL
INDICTMENT
FOR

KIDNAPPING
R.C. 2905.01

DATE OF OFFENSE
On or about January 29th, 1981

THE TERM OF
JANUARY OF 1981

CASE NO.

The State of Ohio,)
) SS.
CUYAHOGA COUNTY)

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely *and by force, threat or deception removed Henry Podborny from the place where he was found or restrained him of his liberty for the purpose of facilitating the commission of a felony or the flight thereafter and/or terrorizing or inflicting serious physical harm on Henry Podborny, and failed to release the victim in a safe place unharmed,*

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ Illegible
Foreman of the Grand Jury

/s/ John T. Corrigan
Prosecuting Attorney.

Court of Common Pleas of Cuyahoga County, Ohio
Ohio v. Robert O'Neal

VOLUME 5

* * *

[1750] Q Can you tell us, Mrs. Toney, how long a period of time you have known Robert O'Neal?

A Approximately eight years.

Q All right. Do you have any association with him?

A Not presently.

Q Did you ever work for him?

A Yes, sir, I did his books.

Q All right. And in addition to being Mr. O'Neal's bookkeeper, did you act as a bookkeeper for anyone else?

A No, sir, just my husband and myself.

* * *

[1763] Q. Tell us what was said.

A. She wanted to hire somebody to protect her family, or an organization to protect them, and I told her I would check and find out and I would get back to her.

Q. Did you have any further conversation with her concerning this protection from the time you were in Chicago or the Chicago area in May of 1980?

A. No, sir.

* * *

[1764] Q. After having this conversation with Dimple Podborny concerning protection did you leave the Chicago area?

A. Yes, sir.

Q. All right. And what did you do when you came back to Cleveland?

A. I talked to James McLean.

Q. Who is James McLean?

A. The gentleman that we talked about earlier that I have known for approximately eight or nine years.

Q. I believe you said he was a loan officer?

A. He was at an industrial corporation.

Q. Where did you have conversation with Mr. McLean?

A. At Howard Johnson's Restaurant on 21.

Q. Do you know what city that's located in?

A. Independence, Ohio.

* * *

[1769] Q. How long did this conversation take place between yourself and Mr. McLean sometime in late May at the Howard Johnson's in Independence?

A. The best I can remember it was about half an hour.

Q. What specifically was said at that meeting?

A. He said that we could get some money by conning her.

Q. All right. Did you and I –

MR. ATKIN: Objection on behalf of Mr. McLean.

Q. I am referring to –

THE COURT: Overruled.

MR. D'ANGELO: We join in that.

Q. I am referring to you and Mr. McLean, did you strike a plan at that time?

A. Yes, we did.

Q. What was your agreement between yourself and Mr. McLean?

A. That my mother-in-law would come to Cleveland and I would introduce him as Stan.

* * *

[1809] Q All right. And how many Sonnys are involved in this particular case?

A Two.

Q What are the names of the two Sonnys?

A One is Sonny Pace and one is a fictional Sonny.

Q A fictional Sonny?

A Yes, sir.

Q And whose brain child was this fictional Sonny?

A Mr. McLean's and I.

Q What was the purpose in creating this fictional Sonny?

A We needed someone in authority and we picked that name.

Q Did you have conversations with your mother-in-law concerning this individual, this fictional individual named Sonny?

A Yes, sir.

Q And when did these conversations take place?

A At different times.

Q Did any of them take place in August of 1980?

A Yes, sir.

* * *

[1818] Q In September, did you have any direct contact with Robert O'Neal?

A Yes, sir.

Q And when and under what circumstances did you have contact with him?

A He came to Chicago, I think, two times during September and I talked to him on the phone.

Q Do you know what his number is?

A I don't remember it.

Q Did you have his number in your possession when you were at the Holiday Inn?

A Yes, sir.

Q Did you make a long distance phone calls [sic], if you know, to Mr. O'Neal while at the Holiday Inn?

A Yes, sir.

Q Now, you testified that there came a time that you gave to Mr. O'Neal $6500.

A Yes, sir.

Q Now was that one of the meetings that you had in Chicago?

A No, sir. I think that was before.

Q When before?

A September.

* * *

[1820] Q What was the purpose of these meetings?

A He came up to try to sue my mother-in-law.

Q What do you mean he came up to try to sue your mother-in-law?

A She was getting very upset.

Q Why?

A She wanted something done. She had paid her money and she wanted something done.

Q As relates to Henry?

A Yes, sir.

Q And what was his involvement?

What was his involvement at this time in conjunction with soothing your mother-in-law?

A Nothing. He just tried to calm her down.

Q And were you present when there was a meeting between Mr. O'Neal and your mother-in-law some time in the summer of 1980?

A Yes, sir.

Q Where did that take place?

A Holiday Inn.

* * *

[1823] Q Did you have any further contact with McLean and/or Robert O'Neal when you arrived back in Cleveland some time in the latter part of September or early October, 1980?

A Yes, sir. I talked to them on the phone just about daily.

Q What were the nature of the conversations that went on between yourself and Mr. O'Neal in October of 1980?

A Mostly about money.

Q You said mostly about money.

What do you mean?

A He was always broke.

Q Did you have any conversation with him concerning this fictitious Sonny?

A Bob knew that he was made up.

MR. ATKIN: Objection, your Honor.

THE COURT: Sustained.

Q Did you give Mr. O'Neal any more money in October of 1980?

A I don't think so during October.

* * *

[1858] BY MR. CORRIGAN:

Q. Did you, in fact, drop your father-in-law off at Bob O'Neal's restaurant?

A. Yes, sir, I did.

Q. What, if anything, did you observe him do?

A. He walked inside.

Q. And what did you do after you observed him walk inside the building?

A. I drove down to the gas station.

Q. Why did you drive down to the gas station?

A. To wait.

Q. Was that prearranged?

A. Yes, sir.

Q. How was it prearranged?

A. By conversations with Bob.

Q. When did these conversations take place?

A. I don't know the exact day.

Q. What were the nature of the conversations?

A. Telling me exactly what to do.

Q. What did he tell you to do?

A. To drop him off and drive down to the corner and wait.

Q. And you did that?

A. Yes, sir.

[1859] Q. How long a period of time were you down at the corner before something happened?

A. About five or ten minutes. I am not sure of the time.

Q. All right. And what, if anything, happened five or ten minutes after you dropped your father-in-law, Henry Podborny, off at 11023 Superior?

A. Bob brought me the keys and wallet and travelers checks.

Q. Whose keys, whose wallet, whose travelers checks?

A. My father-in-law's.

Q. I'm going to show you, Mrs. Podborny, that which has been marked for purposes of identification as State's Exhibit 66, and State's Exhibit 64. Would you look at these two plastic containers, please?

A. Mrs. Toney.

Q. I'm sorry. Mrs. Toney.

A. I don't know. It was just keys. I don't know.

Q. Have you ever seen – you can take them out of there if you want.

A. I wouldn't recognize them. Just keys, a handful of keys.

* * *

[1939] BY MR. CORRIGAN:

Q I think when we broke, Mrs. Toney, we were into the middle or latter part of March, 1981.

Do you have that time frame now?

A Yes, sir.

Q All right. Did there come a time in March of 1981 that you had conversations with Mr. Robert O'Neal?

A Quite a few times.

Q All right. Did there come a time during the latter part of March, 1981, where you had conversation with Mr. Robert O'Neal concerning payment of some money?

A Payment of money?

Q Yes.

A Not that I can recall.

Q All right. You were in Chicago in March of '81, were you not?

A Yes, sir.—

Q Did there come a time that you had conversation with James McLean?

A Yes, sir.

Q What was the nature of that conversation?

A I told him that Bob wanted $500 for keeping Hank.

VOLUME 7

[2345] Q You thought that the federal agents and the federal government out of the goodness of their heart just decided government out of the goodness of their heart just decided not to prosecute you for the pending federal charges?

A I thought they figured I had enough state time to wait for me for 20 years to put me in federal prison.

Q Well, do you know why they waited? By the way, you had already cut your deal, to testify before you came back to Cleveland, didn't you?

A Yes, sir. We signed an agreement [sic] in Columbus.

* * *

VOLUME 9

[2952] Q. Did you discuss money or fees at that time?

A. Yes, I was going to discuss fees with Dimple, and at that point Gail said, "I would like to talk to you for a minute," and we went out into the corridor, and she said, "Tell her," meaning Dimple, "it will cost $5,000."

Q. That discussion with Gail Toney was out of the hearing of Dimple Podborny and Linda?

A. Yes.

Q. Did you ever learn Linda's last name, by the way?

A. I think I may have heard it. I don't recall it.

Q. Did you return back to the lounge?

A. Yes.

Q. And what discussion ensued, if any, at that time?

A. I told Dimple Podborny that we could see that Linda and also her son, James, were protected from Henry, for $5,000.

Q. What was Dimple's reaction to that?

A. She said, "Fine." She didn't have the money, the 5,000. She had a ring and she wanted to know if we could use the ring instead of the money.

* * *

[3064] A. Not that particular phone, only that I have discussed with the FBI, after several of these phone conversations from the Holiday Inn, Richfield, that any future phone calls, try and put through an Ohio Bell number rather than a Western Reserve Telephone Company number.

Q. Now, you –

A. The pay phone number in Richfield is a Western Reserve Telephone Company.

Q. Pardon me?

A. The pay phone in Richfield is a Western Reserve Telephone Company, and their equipment is not the best.

Q. Now, also in the early part of that discussion you were talking about "the gentleman that we talked about last night that still owed some money"; who are you talking about there?

A. Bob O'Neal.

Q. You make a statement, "I've arranged with my friend up on Mayfield." Why did you make that statement?

A. In reference to getting something done with O'Neal, I guess.

Q. You claim is name is Mr. S.

* * *

[3068] A. Yes. It's dated March 19, 1981. It's my signature on the cassette.

Q. Would you look in the upper left-hand corner of the envelope marked State's Exhibit 49. Tell the Court and jury what the date and time is.

A. March 19, 1981, 5:50 p.m.

Q. Who were you talking to on there?

A. Gail Toney.

(Thereupon, State's Exhibit 49 was played in total. Upon completion of same, the following proceedings were had:)

THE COURT: Do you want to complete, Mr. Marino? You can conclude on that tape if you so desire.

MR. MARINO: Okay, Your Honor.

THE COURT: And we will take a recess.

BY MR. MARINO:

Q. Mr. McLean, State's Exhibit 49, the tape that we just listened to, you originally talked at the opening about "this situation with O'Neal." What situation are you talking about?

A. The money that she said that she owed . . .

* * *

[3111] . . . . I asked her why O'Neal had moved Henry to White's. She told me that Lee Warress had visited O'Neal's with a gun and had been threatening to expose her and O'Neal.

"I asked Gail if Henry was still alive, and she said, yes, that O'Neal had arranged with a nurse to have him fed intravenously.

"On March 23, 1981, Gail told me in person, in my automobile, while I was driving from the airport to Howard Johnson's on Route 17 and 21, she told me that she was going to meet Robert O'Neal, the balance of $400 that she owed him for holding Henry."

That's exactly how it's typed.

"She also told me O'Neal was going to advise her what he had done with Henry after she – after her received the $400. And later that same afternoon Gail told

she had given the $400 to O'Neal, but he refused to tell her where –" I guess it's where, were " – where Henry was, except to say Henry was still alive.

* * *

[3227] BY MR. D'ANGELO:

Q. Do you recall your testimony at the last trial, sir?

A. Yes, I think so.

Q. Do you also recall that you made a written statement in connection with this incident, right?

A. Yes.

Q. Now, did you not testify at the last trial the following – it's also part of your statement – "On January 29, 1981 at 11:30 p.m. Gail called me at my home and she asked me if I could meet her at the Holiday Inn parking lot in Richfield, Ohio. I met her there at midnight, and she advised me that she and her brother, Gary Gabbard, had grabbed Henry and tied him up."

Do you remember saying that?

A. Yes.

Q. Is that in fact what she told you?

A. Yes.

Q. Was it true?

A. I don't know whether it was true or not.

Q. Was it true that she told you that?

A. Oh, it was true that she told me that, yes.

Q. She told you that on the telephone, right?

A. No.

[3228] Q. She told you that when she met you at the parking lot at the Holiday Inn, right?

A. That's correct.

Q. What did she tell you over the telephone when she called you up?

A. Just wanted to know if I could meet her.

Q. As a matter of fact, during that telephone conversation where she called you from Captain Frank's, right –

A. She said she was at Captain Frank's, yes –

Q. She told you that she was so nervous, right?

A. No.

Q. Do you recall at the last trial that you testified as follows:

"I said, 'Where are you?' And she said, 'I am at Captain Frank's.'

"I said, 'What are you doing down at Captain Frank's?'

"And she said, 'I don't know how I got down here. I am so nervous.'

"And she said, 'Can you meet me at the Holiday Inn in a half hour, the Holiday Inn at Richfield?' "

Do you remember saying that at the last trial?

A. Yes, that's correct.

Q. So now you remember she said she was nervous, [3229] right?

A. Yes, sir.

Q. And do you recall that when she arrived at the Holiday Inn to meet you, was she also nervous at that time?

A. Yes.

Q. How would you describe her appearance as you observed her at that time?

A. Well, her appearance was normal. She was very nervous, very upset, very excitable.

Q. And she told you that she and her brother grabbed Henry Podborny, tied him up, took his money, right?

A. Yes.

Q. And did she also say there was a large set of keys lying on the car seat?

A. Yes.

Q. And is it not a fact, sir, that after telling you that she and her brother grabbed and tied up Henry Podborny, is it not a fact, sir, that she gave you some American Express traveler's checks?

A. Yes.

Q. She gave you his driver's license?

A. Yes.

Q. And an American Express card?

[3230] A. Yes.

Q. And you took those items, didn't you?

A. Yes.

* * *

VOLUME 10

[3653] A. This is the examination of blood and body fluids, immunological and chemically.

Q. Now, Miss Cowan, you said you examined some pieces of paint from the body, is that correct?

A. Yes.

Q. Were you ever able to match that up, that paint with any other type of paint submitted to you?

A. Not specifically.

Q. Generally?

A. There were similarities –

Q. All right.

A. – of some of the paint collected at 11023 Superior, but there was nothing to positively determine, excluding any other source.

Q. What similarities did you notice from the paint from 11023 –

* * *

A. Similarity in color, that is, tint of color and in porosity of the type of paint.

* * *

[3665] Q. What else did you do in regard to the body on the 25th?

A. Basically after the undressing was to hang the clothing up, due to the condition. It was wet and there were magots [sic] present.

Q. How did you process the clothing in regard to the, at least, the external particles that you saw on it, the dirt and the magots [sic] and so on?

A. After I let it dry on Monday, I took the clothing and that was viewed, and there was paint-like chips, brown, brown on white found.

There was sawdust present. Basically it was more or less going over it with Miss Cowan to see –

* * *

[3676] A. Yes. On May 1st, 1981, I was taken to a place at 11023 Superior.

Q. Would you take a look at State's Exhibit 14 and 14-A through F before you. Do you recognize State's Exhibit 14?

A. Yes, I do.

Q. What is that, please?

A. That is the door at 11023 Superior.

Q. Did you go into that establishment?

A. Yes, I did.

* * *

[3701] BY MR. ATKIN:

Q. Now, when you were at the establishment at 11023 Superior, did you observe a pool table there?

A. Yes.

Q. You did? Was there a pool table cover missing from that pool table?

A. Yes.

Q. Did you make a test on this and determine whether or not that pool table cover came from that pool table?

* * *

A. The pool table coverings received as evidence was for comparison with the one received with the body.

Q. Okay. Well, what about the pool – You are saying there was a pool table in the –

A. Right.

Q. Did you make any comparison with that, the pool table and the covering?

A. No. I was looking for a color and a physical match, which was not found.

VOLUME 11

[3710] Q. Does that restate all your findings in connection with the examination and autopsy of Mr. Podborny's body?

A. Yes, this is the complete report, including all the vital organs, those which were normal, abnormal, those which were sick and those which were injured.

Q. Doctor, showing you what has been marked for identification purposes as State's Exhibit 3, would you take a look at that item, please, and tell the jury what it is?

A. Yes. This is one of your evidence envelopes which I recognize my handwriting, and it contains the deformed bullet which we found in Mr. Podborny's cranial cavity in the brain.

Q. Doctor, showing you what has been marked for identification purposes as State's Exhibits 1 and 1-A through 1-Q, would you take a look at each one in reverse order as it appears right now?

A. Yes.

Q. Explain what it is and show it to the jury, if you are going to define anything in that photograph.

* * *

[3711] State's Exhibit 1-J the body has now been brought with the cart into our autopsy room completely unclothed, naked, showing his appearance as he was before we did anything to change it.

Q. Now, Doctor, on that last exhibit, what is the state of Mr. Podborny's body as far as composition or decomposition as you observed it at that time?

A. The changes that are present here indicate he has been dead for a period of at least weeks. The body has undergone postmortem change in cold weather. Had he

[3712] been dead this long in June, July or August, he would have looked totally different, but he has been dead and the body has undergone postmortem deterioration, or gone bad after death.

State's Exhibit 1-I is again his body completely unclothed from a different angle.

State's Exhibit 1-H shows his back of his trunk. The other he is lying face up. Here he is on his side to show his back. It indicates he has been lying on his back after he was dead, because the blood has been squeezed out of the skin of the back because of pressure of the back on a hard surface.

Q. And is there a term for that, Doctor?

A. Well, that would be postmortem lividity or the settling of blood after death. When blood circulation ceases, the blood goes to the lowest part of the body.

Then we go to State's Exhibit 1-G of his face, which shows his lower teeth in fair condition, his upper teeth in very, very poor condition.

State's Exhibit 1-F shows the overall appearance of his face with a green discoloration, because also in the wrappings with the body was a piece of green cloth. It looked like the green cloth that you see on the pool table. That was laying on his face, and apparently from the weather, rain, snowing, melting snow, . . .

* * *

[3724] Q. Did you see anybody in the Justice Center?

A. Yes.

Q. Who did you see?

A. Bob O'Neal.

Q. Now, Mr. Higgins, did you sign a visiting card before you went to see Mr. O'Neal?

A. Yes.

• • •

[3725] Q. Now, Mr. Higgins, showing you what has been marked for identification as State's Exhibit 86, you see the number 86 on there, sir?

A. Yes.

Q. Do you see your signature on that card?

A. Right here (indicating).

Q. Would you point, hold it up and show it to the jury? Is that your signature?

A. That's my signature.

Q. Now, Mr. Higgins, can you read?

A. No.

Q. Did you fill out that card, other than sign your signature?

A. No.

Q. Who filled out that card?

A. The girl they call Jannie.

Q. Pardon me?

A. Jannie.

Q. And you signed it?

A. Yeah.

Q. Now, did you have a very long wait from the time you got to the jail until you saw Mr. O'Neal?

A. Yes, it was a good wait, because there was a long line of peoples.

Q. Did you eventually get to see Mr. O'Neal that day?

[3726] A. Yes.

Q. Who was with you when you saw him?

A. Jannie.

Q. Would you tell the Court and the jury what occurred and what happened once you saw Mr. O'Neal?

A. He told me he was a – he told me it was a body out there in the field.

Q. You have to keep your voice up, sir.

THE COURT: He told me –

A. He wanted –

THE COURT: He told me there was a boy out there in the field.

Q. He didn't say a boy.

A. A body out there in the field next to where I live at in a plastic bag.

Q. Pardon me?

A. He said a body out there in the field in a plastic bag.

He told me to go out there and cover it up, say his life is in my hands.

Q. Did he tell you anything about how the body got there?

A. He said that's the body that him and Lloyd killed the man and put out there.

Q. How long did your talk with Mr. O'Neal last?

[3727] A. About two minutes.

Q. Well, Jannie Morton – excuse me, was the girl named Jannie there also?

A. Yes.

Q. When he said there was a body out in the field, do you know which field he was talking about?

A. He told me the field next to me, yeah, I know.

Q. Up until that time did you know that there was a body in that field?

A. No, I didn't.

Q. When you met with Mr. O'Neal in jail, did you know why he was in jail?

A. No, I didn't.

Q. When he told you that "that's the man that I and Lloyd killed," did you ask him any questions about that killing?

A. No, I didn't ask him no questions.

Q. Did the girl named Jannie ask him any questions?

A. Yeah. They the one that talked a long time.

Q. Did he ask you to do anything about that body in the field?

A. He told me to go out there and cover it up.

Q. And after your meeting with Mr. O'Neal, where did you go?

A. Back home.

[3728] Q. Who took you there?

A. She did.

Q. When you say "she," who do you mean?

A. Jannie.

Q. Now, Mr. Higgins, did you ever go to that field to see if there was a body there?

A. No, I didn't go.

Q. Why didn't you go?

A. I didn't want to be involved.

Q. Did you ever go back there and look at the body?

A. Unh-unh, not –

Q. Did there come a time when you talked to a city health inspector?

A. Yes, I did.

Q. And about how long after you talked to Mr. O'Neal did you talk to the health inspector?

A. About two weeks.

Q. Do you know that man's name?

A. No, I just know him when I see him.

Q. Can you describe him?

A. Tall, dark, kind of – not too skinny.

• • •

[3733] Q. In relation to that spot where the body was found, when you saw Mr. O'Neal's car there that winter night – was it nighttime or daytime when you saw the car there?

A. Nightime.

Q. Do you know about what time it was?

A. About 10:00 or 10:30.

Q. And if you can, estimate for us how close was the car parked at that time to where the body was found at a later date?

A. About ten or twelve feet.

• • •

[3758] BY MR. D'ANGELO:

Q. Were we nice to you?

A. Yeah, you were nice to me.

Q. Now, Mr. Higgins, when the police first came to arrest you, sir, how many police were there?

A. I don't know. There were a bunch of them.

Q. Were there more than two?

A. Yes.

Q. Do you know if there were any FBI agents there when they came out to your place?

A. I don't know.

Q. And they put you in handcuffs?

A. Yeah, they put me in handcuffs.

Q. When they came to your place, they put you in handcuffs and took you downtown, right?

And isn't it true, Mr. Higgins, you told Mr. Milano and Mr. Coghlan and myself that they kept you in jail for about five hours when they picked you up that day, right?

A. Yes, I stayed down there about five hours.

Q. And they put you in a holding cell, right, in a cell with bars on it?

A. Yes.

[3759] Q. And you were there for about five hours?

A. Yes.

Q. And you would –

THE COURT: Once, once is enough. You are just repeating.

I am telling the attorneys, I don't want repeated questions. It's something new in Ohio.

MR. D'ANGELO: Objection to the comments.

THE COURT: Continue.

BY MR. D'ANGELO:

Q. And isn't it true, Mr. Higgins, they would come to see you back and fourth a couple times, right?

A. They just talked to me one time.

Q. They came to see you one time, then they left, and then they came back again, right?

A. No.

Q. Didn't you tell us that the other day?

A. What?

Q. Didn't you tell us the other day that the police came to see you when you were behind the bars, then they left you and then they came back a couple of times and told you until you tell them what they want to hear that you may be charged with this murder?

[3760] A. Yes, they said that.

* * *

[3761] BY MR. D'ANGELO:

Q. Did they also tell you you could go to jail, to the penitentiary for the rest of your life; didn't the police tell you that?

A. Yes.

Q. And they told you that at first when you were telling them what they didn't want to hear about that, isn't that the truth?

A. No, they didn't say that. I told them myself of my own free will.

Q. Did you tell that –

THE COURT: Wait a second.

Repeat that.

Did you hear that? Repeat his answer.

A. I told them of my own free will.

Q. Did you tell Mr. Milano, myself and Mr. Coghlan that when you were first talking to the police they told you that they didn't want to hear what you are telling them, that they wouldn't let you go until you signed that statement?

A. That's what I told you – all when you – all came out to my house.

Q. That's what you told us, right?

A. Yes.

* * *

[3893] Q. So after the cashing of the checks and giving the money to your sister, Gail Toney, did you do anything else for your sister, Gail Toney?

A. I don't know. I might have went to a store or something like that.

Q. I understand. But in conjunction with this case?

A. Oh, no.

Q. Were you present, sir, when a check was given to Denise Fugate?

A. Yes.

Q. Did you participate in cashing that check?

A. Yes.

Q. Was that about the same time that you cashed these checks?

A. Yes.

Q. How is it that you got the – Denise got the check? Was it given to her in your presence?

A. Yes, I think so.

* * *

[4051] Q. What type of weapon did you receive?

A. A .38 caliber six-shot chrome-plated revolver, black rubber grips.

Q. Is there a type of .38 caliber noted there?

A. Nothing other than Smith and Wesson.

Q. Is there a serial number noted there for that weapon?

A. Yes, sir. Serial number is V as in Victor, 146630.

Q. Did you receive any type of ammunition in connection with that weapon?

A. Yes, sir. Five live .38 caliber rounds and one spent .38 caliber casing.

Q. Now, was that weapon ever returned to Mr. O'Neal?

A. Yes, it was, sir.

Q. And what page are you looking at when you read off when it was returned?

A. Page 255.

Q. What does it state on that page in connection with the date of this item being returned to Mr. O'Neal?

A. It states, "Returned to owner after case was nolled by Mr. Robert O'Neal, 1-6-81."

Signed by Mr. O'Neal with an address of 12203 Chesterfield.

* * *

VOLUME 13

[4446] BY MR. CORRIGAN:

Q. Tell us, Officer, everything that Mr. Lloyd Allen said to you and everything you said to him in the early morning hours of March 26, 1981, in the oral interrogation.

A. During our oral interrogation of Mr. Allen we advised him of the fact that we had knowledge that Mr. Podborny was dropped off on the evening of January 29th at that location, at 11023 Superior. He told us at that time that he was at the building when Mr. Podborny came in, he said, in company with him was Robert O'Neal and another black male unknown to him.

He stated that when Mr. Podborny walked in the door that day, grabbed him and this black male tied him up, this unknown male, tied him up with some wire.

He stated that the man took Mr. Podborny's property, which consisted of a wallet, papers, and gave them to this O'Neal. He said that Mr. O'Neal left the building, moments later he left the building.

He went out, met in a car with Mr. O'Neal and Ms. Toney and told Ms. Toney that he had to hit Mr. O'Neal with a pipe in the legs to keep him from moving.

THE COURT: Mr. Who had to do what?

[4447] THE WITNESS: Mr. Podborny, to keep him from moving.

At that time they were taken to a bar to receive some cash from Ms. Toney from Mr. Podborny's property and they went to Dearing's Bar, I believe, and they had a few drinks.

I presented the crowbar to him and asked him if this was the actual metal pipe that he used to strike Mr. Podborny in the legs. And he stated that he really didn't strike him, or hit him, he just told Ms. Toney that.

I interviewed him as far as – relative to the tapes of the conversation I overheard between Gail Toney and himself. And I told him that "You were talking in a code. You were talking about the taxes and the pages."

I said, "What kind of code was that?"

He stated that he knew it was – something was up, that after the first conversation, after the first phone call

when Gail Toney called him and stated to him that she had a doctor that was willing –

* * *

[4458] THE WITNESS: Date, March 26th, 1981, time: 0700 hours. The following is a statement of Lloyd Gerald Allen, colored male, 29, single, 10501 Wade Avenue, dob 7-9-51, telephone 341-4268, social security number 287-52-4537, employed at Black and White Vending Company at 10023 Superior Avenue.

"Lloyd Gerald Allen, you may be charged with kidnapping and/or conspiracy to commit aggravated murder. Before making any statement that may be used against you at the time of your trial, we wish to repeat the instructions issued prior to oral interrogation, that you have the right to counsel, appointed or retained, before interrogation, that you have the right to remain silent, and that anything you say may be used against you. You have the right to an attorney present while making the statement.

"Question: Now, do you understand this?

"Answer: Yes.

"Question: Do you care to make a statement?

[4459] "Yes.

"Signature, Lloyd G. Allen.

"Lloyd Gerald Allen: Back in January, Gail Toney, Robert O'Neal and a dude named Sonny got together and planned to take a man and hold him. Mrs. Toney asked me to hold a man for a couple of weeks. I said no. This was at O'Neal's place on East 111th and

Superior. Mrs. Toney, me, Mr. S wanted me to do it. It was like he was a big man or something. They got someone I didn't know to come in. I don't know who he was. I ain't never seen him before. I know everybody that comes up and down Superior. Mrs. Toney told me to be in the shop the same evening.

"At about 9:30 P.M., the same night I was at O'Neal's place on Superior. I was there with Bob O'Neal and the black guy I didn't know. The other guy kept walking around saying 'they're late . . . they're late.' He acted scared and nervous. Bob was walking around not saying much. He was nervous too. I was standing by the front door outside and I saw Gail coming down Superior in a tannish colored station wagon. She made a U-turn at the curb right in front of the gate. The girl I was talking to left and I walked back [4460] inside. I was right inside by the door.

"Henry Podborny pushed open the door and shot straight in and asked, 'Where's Dimples?' I saw the guy grab him and they tussled. I was standing by the door. The guy said, 'I got him now.' Then Mr. O'Neal said, 'Give me the stuff.' The other guy gave Bob Hank's keys, checkbooks, and his wallet. He put these things in a rag and gave them to Bob. Hank was laying on the floor by the bar all tied up. Bob left with the stuff and went to Gail's car. I ran out the door and locked it. I went around to Gail's car and Bob and Gail were together. Gail took Bob and me to Dearing's and dropped us off.

"Later Mrs. Toney called Dearing's and told me to go back and see if anything was on the floor. I went back and Hank was gone and the gate was open. Bob stayed in the

restaurant. He was nervous as all outdoors. I left then and got with Jill.

"Question: When Henry Podborny came to the restaurant that night in January who was there?

"Answer: Three. Bob O'Neal, the dude I didn't know and me. And then Gail brought Hank.

[4461] "Question: Where is Henry Podborny now?

"Answer: I don't know.

"Question: Were you armed with any weapons when Henry Podborny arrived?

"Answer: No.

"Question: Did you receive any money from Gail or Bob that night?

"Answer: No.

"Question: Is there anything else you would like to add to this statement?

"Answer: No.

"Question: Have you read the above statement and is it the truth?

"Answer: Yes.

"Question: Signed Lloyd G. Allen, witness James Simone, No. 387, Detective, witness Timothy Patton, Detective, No 1211, by: Simone, No. 387, time completed: 0730 hours, 3-26-81."

BY MR. CORRIGAN:

Q. That which you have just read, Officer, States Exhibit No. 93, came after an oral conversation between yourself and Lloyd Allen?

A. Yes, sir.

* * *

[4464] I asked him if he understood his rights and he stated he did. And he wanted to talk to us about it.

He wanted to know what this was all about.

Q. And is Mr. O'Neal in Court this morning?

A. Yes, sir.

Q. Would you point him out for purposes of the record, please?

A. He is the second man at the table with the blue suit and the dark tie.

Q. And after advising Mr. O'Neal of his constitutional rights, did you have conversation with Robert O'Neal?

A. Yes, sir.

Q. Would you tell us everything you said, everything that Mr. O'Neal said, the early morning hours of March 26th, 1981?

A. We told him what we were there for, what we were asking about in connection with Henry Podborny. We told him we had received certain information that he was present when Mr. Podborny was brought to 11023 Superior.

Mr. O'Neal told us that indeed he was present. He was there with Lloyd Allen and an unknown black male to him, that he was unknown to him. That she was [4465] sitting outside, Gail Toney.

He said when Mr. Podborny arrived in the late evening of January 29th, that Allen and this man grabbed Mr. Podborny, tussled him to the floor. They got his property from him, gave it to him. He in turn went and gave it to Gail Toney, who was out in the car. And she gave him $40, or $60 of cash that was in there. And he went and O'Neal came out then laughing, saying he hit –

Q. I'm sorry. Who came out?

A. Allen came out of 11023 Superior to the car where they were at, saying that he hit Mr. Podborny with the pipe in the leg. Mrs. Toney dropped them off at Dearing's.

We had told him that this conspiracy for this man to grab him started before and he told us that it was arranged through him and Mrs. Toney, that he was to get $6,000 for holding Hank there while they went to Chicago to get his property.

Q. Did he say anything else to you at that time?

A. No.

* * *

[4840] Q. Did there come a time, Bob, when you received any money from Gail Toney?

A. Well, the only money I received from Mrs. Toney was $6,500 from Mrs. Toney.

Q. Okay.

A. It wasn't a receiving, it was an investment.

Q. Tell us how it came about that you got this money.

First of all, was it in cash or check form?

A. It was a check.

Q. And do you remember when it was that you got this money from her?

* * *

[4845] A. I had a little problem in East Cleveland with Judge DeVinne to get the firearm back.

He threw it out of Court.

Q. Without getting into the detail of this case –

A. Do I explain the whole thing?

Q. No. Without getting into the details of that case.

I take it there was something that happened in East Cleveland, right?

A. Yes.

Q. You were charged with something?

A. I was charged, yes, sir.

Q. As a result of that you retained, an attorney?

A. Yes, sir.

Q. And what did you do with that check?

A. I paid an attorney with it.

Q. All right.

As a result of that case in East Cleveland did you come to get a gun back?

A. Yes, I did.

Q. And what kind of a gun was that?

A. A .38.

* * *

[4848] Q. Mr. O'Neal, do you recall certain testimony in this case with respect to an occasion where I believe you were over Gail Toney's residence and you, at sometime in January, you talked to Dimple Podborny and you talked to Gail Toney?

Do you remember that testimony?

A. Yes, sir.

Q. Now, tell the ladies and gentlemen of the jury what happened at that particular time.

A. Well, I was over Mrs. Toney's house. As a matter of fact, I stopped over several occasions to drop her off papers and stuff because she had a young kid and she wasn't able to come over and pick them . . .

* * *

[4863] Q. What about the other guys?

A. They were animals, no offense, the police department, because some very nice people in this department. Detective Patton, he was one. The other staff, more or less, kicked me around.

* * *

[4864] Q. And like good detectives that were using a Mutt and Jeff style one day, one as a bad guy and Mr. Pattonas the nice guy?

* * *

Q. That's what happens in the real world, right?

A. Yes, sir.

Q. Now you heard testimony about certain oral statements people claim you have made.

You heard Detective Patton testify, haven't you?

A. Yes, sir.

Q. Did you tell Detective Patton those things he testified to?

A. No, I didn't tell him, he was telling me.

Q. When Detective Patton was talking, did he have anything in his hands, or anything like that?

A. Yes. He had a statement, Gail Toney's, about that long (indicating), flashing in his hand. He said, "Look see." He said, "Where is the body?"

* * *

[4872] Q. That was the same time of the beating that you had gone through, or similar, that you wanted him to tell you similar about where the body –

A. They didn't beat me like that.

Q. They pushed you?

A. They just yelled and pushed me around.

Q. They looked – knocked you against the wall and said where is the body?

A. They didn't knock me against the wall. They was questioning me and pushing me around, but they didn't put their hands on me bodily.

* * *

VOLUME 14

[4885] Q. What were you trying to buy?

A. Purchase a license.

Q. From the guy at the lounge?

A. From the guy at the lounge.

Q. And this investment that Gail Toney gave you was in the amount of $6,500; is that correct?

A. That's correct.

Q. And does her name appear on any document to your knowledge as to an investor in the bar liquor license?

A. No.

Q. She would be somewhat like a silent partner in this venture?

A. I think the name may be on – let's see. Something in that order, sir.

Q. You've got those documents?

A. Pardon me?

Q. You've got those documents?

A. No, I don't have them.

I didn't say her name was on the document, nor her name didn't appear on any of those documents.

Q. It does not?

A. No.

Q. But she gave you that $6,500; is that correct?

A. She didn't give it to me.

Q. What did she do?

[4886] A. It was an investment.

Q. Oh, she loaned it to you?

A. It was an investment, yes.

Q. Do you have a note signed?

A. It was a check.

Q. Do you have a note signed saying that you –

A. No, I don't have it.

* * *

[4892] Q. And Wilbur Higgins is not an individual that you would classify as one of your family, is he?

A. That's right.

Q. And you did in fact ask Jannie Morton to bring Wilbur Higgins up to see you; is that correct?

A. Yes, I did.

Q. And you claim that is business; is that correct?

A. Exactly.

Q. And Wilbur Higgins says what that business is; is that correct?

MR. D'ANGELO: Objection.

THE WITNESS: Wilbur Higgins lied.

Q. Wilbur Higgins said you weren't talking about no jukeboxes; do you remember that?

MR. D'ANGELO: Objection.

THE COURT: Overruled.

THE WITNESS: Yes, I remember that.

Q. Wilbur Higgins told us you told him to go out and cover up the body, that's the body you and Lloyd killed?

A. Wilbur Higgins lied.

Q. He lied?

* * *

[4917] Q. You weren't yelling hey, Wilbur, get out there and cover the body in the field, fix our cheap spot?

A. I ain't told Wilbur nothing.

Q. Wilbur is lying; is that right?

A. Yes, he is lying.

Q. Detective Patton is lying?

A. I'm not going to call him a liar. If he said that, Wilbur is lying.

Q. He said that you said Gail Toney brought Henry Podborny to your bar, that makes him a liar, doesn't it?

A. It makes the statement a liar.

* * *

[4926] A. That statement lied. That statement is a lie he wrote.

Q. Mr. Lloyd Allen?

A. The statement he wrote is a lie.

Q. Is Mr. Lloyd Allen lying when he tells Detective Patton –

A. The statement he wrote is a damn lie.

Q. Excuse me.

Is Mr. Lloyd Allen lying when he told Detective Patton that you and he were in your bar the night Henry Podborn [sic] was brought?

A. The statement he wrote was a liar.

Q. Is Mr. Lloyd Allen lying when he told Detective Patton that you and he were in your bar the night that Henry Podborny was brought to you by Gail Toney?

MR. D'ANGELO: Objection.

THE COURT: Overruled.

THE WITNESS: The statement he wrote was a damn liar.

* * *

VOLUME 15

[5760] We then had the testimony of Christian Wag. Christian Wag testified in essence that he was the escrow agent for Robert O'Neal. That he was attempting to negotiate the purchase of a liquor license out of the Gaiety Lounge, that he received $6500. I think the term was good money, either a cashier's check, or a certified check. That he held that certified check, or cashier's check, $6500, until sometime, if I recall his testimony, to October 20th, or shortly thereafter where he gave the money back over to Mr. O'Neal. You now know the money ultimately was given to Mr. O'Neal as the result of his little problem in East Cleveland, which was ultimately turned over for his representation as it relates to this.

* * *

VOLUME 16

[5803] After Detective Patton's testimony, we then got into the defendant's case, if you recall. Robert O'Neal took the stand. You must assess his credibility as you assessed the credibility of any other witness. Robert O'Neal made reference to some trouble in East Cleveland,

tried to deceive you, ladies and gentlemen, that it was something to do with the registration. We now know –

MR. D'ANGELO: Objection.

THE COURT: Overruled.

MR. CORRIGAN: We now know it resulted in the death of Calvin Hines. He specifically was asked the question "Mr. O'Neal, isn't it a fact that you made a statement to Sergeant Deardon of East Cleveland that you, sir, said something to the extent he pulled a gun on me, so I shot him?" On this witness stand he said he didn't pull the trigger, or on this witness stand he said he hit him with the gun, but didn't shoot him.

You heard the testimony of Sergeant Horwitz, which boldly show you that this man stood right in front of you and lied. He also [5804] said that this man, Detective Patton, never advised him of his rights. Look at that piece of testimony and contrast it with all of the other witnesses, Gail Toney, James McLean, Leland Waress, Dimple Podborny herself, who indicated yes, he advised me of my constitutional rights, and decide whether or not O'Neal is telling the truth, or lying to all of you. I think your conclusion will obviously be that this man over here is lying to you.

We then had the testimony of L. Allen. L. Allen got on the stand, said he was beaten, notwithstanding the testimony of Dr. Paley, notwithstanding the photograph, State's Exhibit 98 I believe, notwithstanding the testimony of his former attorney, Patrick D'Angelo who indicated sometime in March he saw him with a severed lip,

notwithstanding the comment by Robert O'Neal indicating his lip was cut, hanging down. You look at that photograph. You make a determination whether or not Mr. Allen was beaten or not. You can conclude only but one thing, this man over here lied, Allen lied, he is a liar.

MR. ATKIN: Objection.

THE COURT: Overruled.

* * *

[5809] Ladies and gentlemen, as it relates to Mr. O'Neal, Mr. O'Neal talked to you about a little problem in East Cleveland, which in all actuality was the killing of another human being, where he killed Calvin Hines. The defense brought up this little problem in East Cleveland. The State of Ohio did not. We know from the [5810] evidence that a gun, a .38 caliber Smith & Wesson was turned over to this guy on January 6, 1981. We know that that's consistent with the pellet that caused the death in addition to the bludgeoning of Henry Podborny.

The pellet was removed by the coroner's office. It is consistent with the .38 caliber Smith & Wesson.

We place a .38 caliber Smith & Wesson in this guy's hand on January 6, 1981. Mr. O'Neal wants you to believe he knew nothing about it, Henry Podborny, yet based on the evidence, bludgeoned to death and shot to death, it was in his establishment. You will have the opportunity to look at these exhibits.

* * *

[5812] In his statement O'Neal admits to participation in the kidnapping. You recall the testimony of Detective

Patton, he, like the other people in this case, admit to a little bit, but then try to remove themselves from the aggravated murder aspect, which doesn't cut it, based on the law of the State, and the court will tell you the law as it relates to conspiracy and aiding and abetting and the participation in any particular part of the course of a criminal conduct makes you responsible for the totality of the crimes that are before you.

* * *

[5832] There has been mention about certain money which Mr. O'Neal supposedly received in this case. There is no question that he received a check for $6,500, but the prosecutor wants you to believe that that $6,500 was partial payment for his performance in this case. And I ask you [5833] to consider whether or not a person who is going to kill someone is going to take a certified bank check where it can be traced directly to him, his payment to kill someone, and then go ahead and do it? If you believe that, ladies and gentlemen, that's your prerogative. I suggest to you that the purpose of that $6,500 was just as Gail Toney testified.

She didn't say that was part of the hit money. She told you that was for the liquor license. And if you look at what Mr. O'Neal did, he gave it to an attorney. He attempted to purchase a liquor license until there was a problem in East Cleveland where he needed his money, which brings us to another part in this trial of certain other misrepresentations to you.

The prosecutor deemed it appropriate to call this detective from East Cleveland to show Mr. O'Neal received a .38 caliber Smith & Wesson gun on January 6,

1981. And he left it at that. Whether Mr. O'Neal took the stand to testify as to the facts surrounding that incident, he was limited by laws to what he can say.

* * *

[5838] Gail Toney, her brother, Gary Gabbard and Waress, they met. They discussed violence and it pertained to Henry Podborny. Lee Waress testified that Gary Gabbord says that man don't talk.

Dimple Podborny wasn't at that meeting. Lloyd Allen wasn't at that meeting. Robert O'Neal wasn't at that meeting. Do you have two assassinations discussed in this case?

All of a sudden, Gabbard and Waress and whoever else must be involved, which we have no way of knowing, all of sudden they bail out. And Lloyd Allen and Bob O'Neal pick up from there. Bob O'Neal because he is going to get $400 and then another $100, another $400. He only gets $300 because Gail Toney is keeping $100 for him. This man is going to kill a person in his own place with evidence in his own place and then drop the body off in a field next to the building he owns, stay out on the street for two months, knowing, as suggested, that he has organized crime and the Danny Green, and all those people he knows, he is going to leave the [5839] body in the field for two months and not do anything? And then when the body is discovered, or before then, he is going to have a Wilbur Higgins type move the body, this man who is supposedly a street person, is going to tell Wilbur Higgins to move the body, or do something, don't even move it, just cover it up. That's the reasonable testimony you heard in this particular case, folks.

Ask yourselves why did Lee Waress get so upset because he didn't get his $30,000. Does a person become so upset that he arms himself with a gun and goes looking for people because he had three meetings and because of those three meetings he is entitled to his $30,000? No cocaine dealer, no big drug people with a lot of people involved, you just to go a lot of meetings and get a lot of money. This man just talked. He engaged in conversation. And he wasn't the type of person to kill because he withdrew from the conspiracy and in the interest of justice, these people only let him plea to kidnapping because he was so essential to the State in this case. He was very important in their breaking their case, Lee Waress.

[5840] He was so important that he wasn't even talked to when he was in the County Jail. He was so important that Detective Patton respected his wishes. Would you care to talk to us now, I have an attorney, Bill Summers, end of conversation. No oral statement, no confrontation, no nothing, but Dimple Podborny, the millionaire's wife, that's up in Chicago, who seemingly would have an attorney there too, no problem about going up there where he is, in her hospital bed, and put words in her mouth, but forget about Lee Waress, forget about this man who wants his $30,000 for nothing.

Ladies and gentlemen, you heard the testimony in this case from James McLean about what happened on the 29th. And you heard testimony that immediately before the 29th, I believe one or two days before the 29th of January, Gail Toney called McLean and told McLean what was going to happen, we are going to grab Henry,

me and my brother. That's what she told him two days before it actually took place.

She had access to O'Neal's place. And whatever significance it is that O'Neal has the – I don't know what to call it – he had sex with [5841] this woman, for however long he should be convicted for that, I would admit, but this woman, Gail Toney, she worked for him. She had access to his place. She knew, as Lee Waress testified, that they can take him to O'Neal's place. That there is someplace downstairs with a door that has bars on it that he could be locked in.

She knew about that. She knew if Mr. O'Neal was – Mr. Podborny was done harm over at McLean's place, how would it trace back to her. She told McLean that her and her brother would do something.

What happens the night of the 29th right after Mr. Podborny is done in? It is no question, I don't care if you can show that pool table covering is from O'Neal's pool table, there is no question in my mind that Mr. Podborny was killed at that location. There is no question about that. No. No one is trying to play games, but you can't deny the blood on all of those things. The man was killed there. He was bludgeoned. He was shot there.

There is also no doubt that Gail Toney immediately after this poor man was shot and bludgeoned that she runs to meet McLean. She [5842] comes down to Captain Frank's and makes a phone call from a pay phone saying I got the keys. When she meets him what does she do? She gives this fine shyster a dead man's driver's license and an American Express Card and traveling checks.

Now, Mr. McLean wants you to believe he doesn't know anything. He doesn't know Mr. Podborny is dead. All of a sudden this man got a man's driver's license, American Express Card and traveling checks and Gail Toney told him at that point in time when she met him at the Holiday Inn parking lot out in Richfield, that me and my brother grabbed Henry, we tied him up, we grabbed him.

* * *

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[6075] Now, I fear that defense counsel gave you the impression that each defendant must commit every element of the crime to be liable. That's incorrect.

MR. COGHLIN: Objection.

THE COURT: Overruled.

MR. MARINO: In the state of Ohio and in most states in my opinion we have what's called conspiracy and the judge is going to tell you about that. The State is bound to prove to a jury two things. First, that the crimes alleged have been committed. And at this point, is there any doubt in your mind that the man was kidnapped, he was robbed, he was bludgeoned and shot to death. The next thing we're bound to prove to you is that those accused [6076] of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes.

MR. MILANO: Objection. It is a misstatement of the law, sir.

THE COURT: Overruled.

MR. MARINO: Folks, if that's a misstatement of the law, you are the second jury to hear it.

MR. COGHLIN: Objection, Your Honor.

THE COURT: Overruled. I would indicate the first case will not be mentioned in this closing argument.

* * *

[6084] MR. MARINO: First counsel for Mr. O'Neal asked you to ask me some questions about why things did or did not occur and I can answer one of them right now. And it galls me. Why didn't we take the pellet from the head of Calvin .38 Special five grooves to the right, copper jacketed pellet, compare it with [6085] the same bullet, the same type that killed Henry Podborny. Well, you know we had Elmer Ruple subpoenaed and every defense attorney here objected to bringing that man here.

MR. MILANO: Objection.

THE COURT: Overruled.

MR. MARINO: And they argue to you now why didn't we bring that person here. They bring that up now when they know we tried to bring him in.

MR. D'ANGELO: Objection, Your Honor.

THE COURT: Overruled.

MR. MARINO: You take some of the words used by counsel for Mrs. Podborny and apply it to that

incident. That language, by the way, if you think was bad when he was sitting here, you should have been sitting there and standing here during the trial and it is not said just about me. That is not the way to conduct, I think, a $250,000 defense. They are grabbing at straws trying to save the principals, knowing that the aiders and abettors have already been convicted, that is reprehensible.

[6086] MR. COGHLIN: Objection.

THE COURT: Overruled.

MR. MARINO: I even recall counsel for Mr. Allen bringing up this idea of gun registration again. Now, you know I want to take you back to that point alone. To review the course of conduct at that stage of the trial. The officer who we had take the stand just to come in and tell you that we know Robert O'Neal had a Smith & Wesson .38 caliber pistol, at one time given back to him on January 6th of 1981. And O'Neal - excuse me - yes, O'Neal takes the stand and says, "Well, that was a small problem in East Cleveland." And when we started to get into it, the best $250,000 piece of advice I ever heard was when I was examining Mr. O'Neal and counsel for Mr. O'Neal stood up and said, "Keep your mouth shut." That's good advice. If they all had kept their mouths shut, they might not have been in this position.

MR. COGHLIN: Objection.

THE COURT: Overruled.

MR. MARINO: But then counsel for Mr. Allen went on to embellish them and he says, "Well, is the gun registration straight, [6087] when the gun is confiscated and they take that gun and fire a gun because they had

told you the gun was not only returned to him, but five live rounds and one spent pellet was returned to him, now that is a bit much to take in. They were misleading you on that point. Then O'Neal says, "I would be crazy to shoot a man with a registered gun." Why does it make you sane if you kill without a registered gun, is that the standard of sanity?

We showed you evidence that the killer who pulled the trigger lied. And he lied about a very important matter. He not only lied about being crazy about killing a man with a registered gun, counsel misled you, he further lied about how it occurred. "I hit him on the head and the gun went off." You show me one gun that is fired by hitting someone with the gun. You have to pull the trigger. He is going to complain it is a defective gun. Where is that gun? That's how we will make an accurate comparison of those pellets.

And Officer Dearden did take the stand and testify - his sergeant did. Are we calling him a liar, too? We gave O'Neal a fair chance to [6088] say whether or not he ever made the statement, "That guy pulled a gun on me so I shot him." Denied it. Tried to make himself look innocent, tried to make himself look like a peaceful law abiding citizen. Which of you could shoot me first if I pulled a gun on you?

MR. D'ANGELO: Objection.

THE COURT: Overruled.

MR. MARINO: I also wonder about those situations. A guy pulled a gun on me so I shot him. Great.

* * *

[6094] . . . . Basically, he is the one that those two individuals met with and talked about different schemes to get Henry Podborny to come to Cleveland. Again, he is not the type of individual you are going to ask home to dinner, but he is the type of individual these people would involve in a murder. That's not our fault. That's their fault.

Mr. Waress completed one portion of what this case is about. He talked about a criminal act, he conspired, he sat down with other people and talked about vile criminal acts and how it could be perpetrated. If he had done further and gone to Chicago as Gary Gabbard did to get the fruits of the crime, or if he had gone farther like these people had and committed a violent act, or if he was the one to pay people for this like Dimple Podborny did, then he would be guilty of each and every crime alleged in the indictment.

Because he stopped now, you are going to say he stopped because he got caught, or because he didn't want to get involved, or because they cut him out, whatever the reason is, the fact [6095] in this case shows that he cut himself out. We even brought out that he admitted, sure, I would have taken that money if I could have gotten it. Now, they cut him off. The law didn't say you get points, or you lose points because you could have done something, it says if you conspire and take one step further and act, you not only are guilty of conspiracy, but each and every crime that follows from that conspiracy, whether or not you intended –

MR. MILANO: Objection, sir, to the law.

THE COURT: Sustained as to the law. I will give you the law.

* * *

[6104] They tried to tell you, and I think it should have stood out in the case, that when Mary Ann Zablocki testified the situation, much like the little problem in East Cleveland when they tried to group the situation, developed that I believe it was Mr. Milano's cross-examination, and they were trying to explain how Mrs. Zablocki – or Miss Zablocki heard the phrase the body is in the field somewhere. . . .

* * *

[6120] And I ask you to look at these facts reasonably as your fellow jurors have done with common sense and without any sympathy. That's the one thing that we fear in this case, it's sympathy. I know she is 60 years old. She is going to live a lot longer than Henry Podborny. She's got a heart problem and Henry's got a head problem.

You go back there and you want to consider how bad this act was, you pick up that crowbar and say that has no evidence on this, of course it doesn't have evidence on it. . . .

* * *

[6121] And as far as the crowbar, you pick that crowbar up, you get the dirt on your hands, you tell me about it. There is nothing on that crowbar, but when you get back there, think about what it might be like, first of all, to sit down and talk about kidnapping another human being. Get into the case. You are going to have his clothes back there. Grab those things, they stink, they've got

blood on them. Wrap [6122] yourself in that blanket and see what the victim of a murder is like.

MR. D'ANGELO: Objection.

THE COURT: Overruled.

MR. MARINO: Put a sheet over you, put the plastic over you. I tell you this now because this is what the case is all about.

THE COURT: Hold it a minute.

(Thereupon, the Court whispered the following into the court reporter's ear out of the hearing of the jury.)

THE COURT: The Court at this point is going to indicate that the defense attorneys have systematically interrupted throughout the train of the plaintiff's – or rather of the prosecutor's. This is exhibited by anybody who would look at this record. The man has talked within the record more than anybody who has addressed this jury. He has stayed with the record and please, if you can't give a legitimate objection, hold your peace and let the man finish.

MR. D'ANGELO: Objection.

THE COURT: Done alternatively [6123] too, put that on there.

(Thereupon, the following proceedings were had in open court in the presence and hearing of the jury.)

MR. MARINO: As I said, I asked you to do this, to get into the case, to really handle this case. You can always wash up later, folks. To find out how seedy an act is, to grab a man and murder him, pick up that tire iron

and ask yourselves to really take that iron yourself and hit somebody in the head five times, could you do that? Who could but a murderer. Who could but a man who would never – he would be crazy to kill someone with a registered gun.

* * *

[6152] You are instructed, ladies and gentlemen, that the testimony is not used to supplant but rather supplement your judgment. Now, ladies and gentlemen, the testimony has been introduced that expert witnesses and co-conspirators and co-defendants, to wit, Leland Waress, Lola Gail Toney and Mark Gabbard and McNeal –

MR. MARINO: McLean.

THE COURT: McLean, rather, not McNeal, it is O'Neal, rather, it is McLean who I meant, has been convicted of previous acts, previous criminal acts in the past. The testimony relating to these previous convictions may be considered for the purpose of helping you test the credibility or weight to be given the testimony of such witnesses.

The testimony relating to previous convictions cannot be considered for any other [6153] purpose.

Now, the Court would indicate that one who testifies on the basis of a direct or implied promise from the prosecution, that he will be dealt with in a preferential limited fashion, is a competent witness. And the testimony of such witness may be received in evidence and considered by the jury. Such testimony should be examined closely and should be afforded such weight as you in applying the standard of credibility, which has been

previously told you, identified by me, that you believe such testimony is entitled, to such weight as it is entitled.

Other persons have – and another person, Lola Gail Toney, one O'Neal, Gary – not Gary Gabbard –

MR. COGHLAN: I believe the Court misspoke. I believe you mean McLean rather than O'Neal.

THE COURT: Again, thank you, Mr. Coghlan.

* * *

[6158] So we go to the first count. The Grand Jury returned an indictment under 2903.01(a), which statute reads: "No person shall purposely and with prior calculation and design cause the death of another."

The indictment was returned against the defendants under favor of that statute in the fact that they were alleged to have committed an aggravated murder of one Henry Podborny.

I will give the elements of aggravated murder. Once again aggravated murder is defined as follows: "No person shall purposely of a prior calculation or design cause the death of another."

Aggravated murder, therefore, is the killing of another purposely and with prior calculation and design. Before you can find the Defendants Robert O'Neal, Lloyd Allen, Dimple Podborny guilty of aggravated murder, you must find beyond a reasonable doubt, ladies and gentlemen, that first that Henry Podborny was a living person and that his death was caused by the defendants or by a conspirator, co-conspirator or one aiding and abetting the defendants, the [6159] individuals charged in

this crime, those people charged in this crime. And that the death was caused in Cuyahoga County, Ohio, on or about the 29th day of January, 1981.

Secondly, that the killing was done purposely and, thirdly, that the killing was done with prior calculation and design and, fourthly, that the act was an unlawful done willfully.

I mentioned the word purposely. And the Court will indicate that the purpose is an element of each one of these three counts. And I'm going to give it a full explanation now and as we reach the other ones just indicate what purpose is, the other counts that is aggravated robbery and kidnapping.

Purpose to kill is an element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendants or co-defendants or aiders and abettors, if you so find, a specific intention to kill the decedent Henry Podborny.

The Court in order to assist you in [6160] understanding the meaning of purpose or purposeful herein would give you this kind of special – will give you this instruction. Wherein the evidence may disclose the existence of complicity by way of an aider or abettor or a conspiracy, the law of the State of Ohio is as follows: As stated in the leading case in the matter where you have an unlawful act contemplated in the original conspiracy, although not identical with or similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was

performed was reasonable or likely to produce the death of another, then each conspirator, or aider or abettor is equally guilty as the principal offender of the homicide.

Although such conspirator, or aider and abettor as a conspirator was neither present or had knowledge of the physical killing, or the weapon used.

Now, a person acts purposely when the gist of the offense is a prohibition of conduct against a certain nature regardless of what the offender intended to accomplish. Therefore, if it is the specific intention and purpose to [6161] engage in an act of that nature, then the specific conduct or objective in producing a certain act results or engaged at the time specific conduct to do an act. Purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

The purpose with which a person does an act is known only to him unless he expresses it to others either orally or indicates it, or by his conduct or indicates it through his conduct. Purpose with which a person does an act or brings about a certain result is determined from the manner in which it is done, the means used, or the weapon used, and any and all facts and circumstances in evidence.

Now, if a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life and to inflict great bodily harm, the purpose to, intent to kill may be inferred from the use of the weapon.

The Court has used the word deadly weapon. Deadly weapon is an object or instrument which is capable of inflicting death. And in determining whether or not a gun

or instrument was used in this particular case, you will consider [6162] the evidence and consider the nature of the instrument, its capability to inflict deadly harm and the manner which you find it was used in in [sic] this case from the evidence.

Now, ladies and gentlemen, proof of motive is not required in this case. The presence or absence of motive is one circumstance bearing upon the intent of purpose. The word unlawful in the statute means contrary to law.

Now, ladies and gentlemen, the Court will continue to define the various elements and I will define purpose again to robbery and kidnapping in a few moments. Being aggravated robbery and kidnapping, having the elements of purpose, now prior calculation and design is an essential element of the crime of aggravated murder.

Prior calculation and design means that the purpose to kill was reached by the defendants through a definite process of reasoning in advance of the killing, which process of reason must have included a little plan involving a steady consideration of the method, the means or the instrument which kills another or a weapon used to kill another.

[6163] No definite period of time must have elapsed, or no particular amount of consideration must be given to the prior calculation and design to kill, but acting on the spur of the moment or after monetary consideration of the purpose to kill is not sufficient to constitute the crime of prior calculation and design – strike that. Constitute the crime prior calculation, or the prior calculation and design needed to meet the element required for aggravated murder.

If you find from the evidence that the defendant or the co-conspirators, co-conspirator, either individually or co-conspirators, or aider and abettor were actually performing the act to kill and this purpose was arrived at with prior calculation and design before he or she performed the act, that is sufficient for this element of the crime of aggravated murder.

Proximate cause is an essential element of the crime of aggravated murder. Proximate cause is an act which in a natural and continuous sequence produces the result and without which it would not have occurred, that is the death of Henry Podborny. Proximate cause exists when the death was a natural and probable result of the [6164] result of the act or acts. In this case the death of Henry Podborny must have been – pardon me, must be such as would naturally and logically and proximately result from the defendants, codefendants or aider and abettors as complicitor acts or these acts must have been such as would reasonably be anticipated by an ordinary prudent man as to likely result in death.

If you find the use of a deadly weapon or dangerous instrument, then use is another essential element of the crime of aggravated murder and aggravated robbery and kidnapping.

Therefore, the statements prove that the crime took place on or about the 29th day of January, 1981, here in Cuyahoga County, Ohio.

Now, ladies and gentlemen, to aggravated murder finally. If you find that the State of Ohio has proved beyond a reasonable doubt each and every essential element of the crime of aggravated murder under 2903.01(a)

as I just explained to you, your verdict must be guilty. And you must find the defendants guilty of aggravated murder. If on the other hand you find that the State has failed to prove any beyond a reasonable doubt each and every essential element [6165] of all of any one of the elements of the crime of aggravated murder then you must find the defendants not guilty of aggravated murder.

The Court would indicate at this time in this particular case we have multiple defendants. We have three. And we discussed separating the question of guilt or innocence with each one of these defendants. You must separately consider the elements applicable to each one of the defendants as he or she were separately tried and you must separate it in your finding, as I will explain, to each defendant. You must state your finding to each count separately, also, and to each defendant uninfluenced by the verdict as it relates to the other defendants.

The counts, three separate counts, have to be considered separately. The defendants, each and every one of them, may be found guilty, or not guilty as to any one or all of the charge set forth in the indictment.

Now, as to the second count, the second count termed under aggravated robbery and this is found under 2905.01, which reads as follows:

"No person in attempting or committing a theft offense as defined in Section 2913.01 of [6166] the Ohio Revised Code, or in fleeing immediately after such offense, or offenses, shall do either of the following –" And I have paraphrased this, either have a deadly weapon or dangerous ordnance as defined under 2923.11

on or about his person or under his control or in the alternative, inflict or attempt to inflict serious physical harm on another.

The elements briefly, from the definitions are that these defendants, or co-conspirators, or one which you find to be an aider and abettor, inflicts serious harm or attempts to inflict serious harm on another, or in the alternative that the defendant has a deadly weapon or dangerous ordnance on or about his person or under his control and that the defendant was either, in either case, was committing or attempting to commit a theft offense, or anything immediately thereafter of a felony, normally the Court would indicate that the defendants are charged with aggravated robbery.

And before you can find the defendants guilty, you must find beyond a reasonable doubt that on or about the 29th day of January, 1981, here in Cuyahoga County, that the defendants or an [6167] aider and abettor or co-conspirator, did obtain or attempt to obtain property of some value, however small, for the purpose of depriving Henry Podborny of that property and the defendant had a deadly weapon or dangerous ordnance on or about his or her person or under her control. Or in the alternative, you will consider the alternative of serious physical harm, that is the defendants inflicted serious harm upon the person of Henry Podborny.

Now, those are the elements of aggravated robbery conspired in this case.

Now, purpose again is an essential element of the crime of aggravated robbery. Purpose to deprive the owner of his property and to obtain the property is an

essential element of aggravated robbery. And once against a purposeful act, purposely is the specific intention to obtain certain results. And in this case it must be established at the time in question there was intent in the mind of the defendants and/or co-conspirators, or aides and abettors in complicity a specific contention to obtain the property of Henry Podborny.

Now to determine the purpose from which [6168] the person acts, does an act or brings about a specific result, is determined by the manner in which it is done, the means or weapon used and the weapon used and all other facts and circumstances in evidence. As to the issue – as to the issue, rather, of a deadly weapon or dangerous ordnance, a deadly weapon, I have explained it one way. There is another way to explain it.

Deadly weapon is an instrument, device or thing capable of inflicting death designed specifically, or especially adopted for use as a weapon or possessed or carried as a weapon. A deadly weapon is an object or instrument capable of inflicting death.

In determining whether or not a gun is an instrument or thing was used as a deadly weapon, you will consider the evidence, all of the evidence. The thing that is its nature, its capability, can be used a deadly weapon, and the manner you find it was used from the evidence, or threatened to be used from the evidence in this case.

Deadly weapon is an object or instrument also of such size and weight and of such design and shape that it may be grasped in the hand in [6169] such a way that it may be used upon or directed against thebody [sic] of

another in a manner with such force to injure or kill the other – another person.

It is a question of fact for you to determine whether or not objects, things, instruments claim to have been used in the evidence, was a deadly weapon, including the gun, and was used or threatened to be used in this particular case.

Now, a number of definitions, proof of fear or apprehension on the part of the person namely whom the weapon is used or threatened to be used, is not required.

As to the element of serious physical harm, which is alleged in the indictment as an alternative. Serious physical harm means by condition or such, or of such gravity as would normally require hospitalization, which involved acute pain of such duration as to result in substantial suffering or death.

The word attempt is used. Attempt is some statute purposely performed, which conduct if successful would constitute or result in the crime, the act or acts must be such as to identify [6170] the crime and to indicate its commencement, but is not necessary that the crime actually be completed. This is only as limited to the robbery statute. Aggravated robbery statute. Conduct constitutes an attempt where the acts are an immediate and substantial extent as to the execution of a criminal crime and of which will be completed but for an unexpected reason.

In conclusion, the Court would indicate to you as it relates to count number two, aggravated robbery. If you find that the State of Ohio has proven each and every essential element of the crime of aggravated robbery as

against the defendants, those who you find as co-conspirators, or aider and abettor, in that on January 29th, you found that they did unlawfully and purposely did in attempting to commit a theft offense as defined in 2913.01 and a theft offense, robbery is a theft offense, stealing is a theft offense.

In committing a theft offense, or in attempting to commit, fleeing thereafter, such offense upon Henry Podborny the defendants did have a deadly weapon or dangerous ordnance, to wit, a gun as alleged in the indictment, a gun on or about his person or under their control or [6171] if you find beyond a reasonable doubt in the alternative that on or about the 29th day of January, the defendants or co-conspirators or aiders and abettors or persons acting in concert with them unlawfully and purposely in attempting to commit a theft offense or in fleeing immediately after such attempt or offense upon Henry Podborny did inflict or attempt to inflict serious physical harm upon Henry Podborny then you should find the defendants guilty in the aggravated robbery, second count.

On the other hand, if you find the State of Ohio failed to prove any one of the elements beyond a reasonable doubt, any one of these elements that I have given to you, in the alternative form of aggravated robbery, failed to produce evidence that convinces you beyond a reasonable doubt of the indictment of the defendants or failed to prove any one of the essential elements of alternates that I have given to you, then you should find the defendants not guilty of aggravated robbery.

Now, the third count in this case involving kidnapping under 2905.01. And that statute reads as follows:

[6172] "No person by force, threat or deception or by any means shall remove another from the place where he is found, or restrain him of his liberty for any of the following purposes," and the purposes alleged in this statute that are alleged in the indictment are as follows: To facilitate the commission of any physical, any or, flight thereafter. That's under two of the statute.

Three, to terrorize or inflict serious harm on the victim or another. Therefore, you have these several elements as follows, to wit, one, that the defendant removes another, defendants, and when I say defendants I'm talking also about co-conspirators and aider and abettors, the defendants removed another from a place where he is found. And the defendants restrained another of his liberty and, two, that the means of removal or restraint is by either force, threat or deception. And, three, that the defendants purpose is to facilitate the commission of any felony or flight after the commission of a felony or in the alternative it is an either-or situation, again, is to terrorize the victim or to inflict serious physical harm to the victim.

[6173] That's the short form. I believe short-long all the way through here because that's the short form of what the State has to prove under the kidnapping statute before you can find the defendants herein, that is Gail Robert O'Neal, Lawrence O'Neal, Lloyd G. Allen, Dimple Podborny, guilty of kidnapping of Henry Podborny, you must find that beyond a reasonable doubt that on or about the 29th day of January, 1981, and in Cuyahoga

County, Ohio, that the defendant, co-defendants, conspirators, rather aider and abettors, in complicity removed Henry Podborny from the place where he was found or restrained Henry Podborny of his liberty for the purpose of facilitating the commission of a felony or flight thereafter or in the alternative terrorize him or in the alternative to inflict serious physical harm on Henry Podborny and that such acts were accomplished by force, threat or deception.

* * *

[6207] THE COURT: I'm in receipt of a question. The question in substance is asked me, the question asked me is to read again aggravated murder. Specifically as signed by [6208] Amon Ray, "Can we please have a brief definition of the laws of aggravated murder?"

I'll give you the elements of the crime of aggravated murder.

Aggravated murder is defined under Section 2903.01 as follows:

"No person shall purposely with prior calculation and design cause the death of another."

Aggravated murder, therefore, is the killing of another purposely and with prior calculation and design.

Before you can find the defendants guilty of aggravated murder, you must find beyond a reasonable doubt, ladies and gentlemen, that, first, that Henry Podborny was a living person, was a living person and that his death was caused by the defendants, or by a conspirator, or aider and abettor in complicity, that is the individuals charged with the crime, and that the death was caused

here in Cuyahoga County on or about the 29th day of January, 1981.

Second, that the killing was done purposely. And third, that the killing was done with prior calculation and design. Fourth, that [6209] the act was an unlawful act done willfully.

I make mention of the word purpose. Purpose to kill is an essential element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question, there was present in the minds of the defendants, the co-conspirator, or aider and abettor, in complicity, if you find such a specific intention to kill the decedent, Henry Podborny.

The Court in order to assist you understand the element of purpose and purposely herein, wherein the evidence discloses an existence of complicity by way of aider and abettor and conspiracy, the Court instructs you, as I stated in the law of Ohio as follows: When you have an unlawful act being contemplated in an original conspiracy such as a kidnapping, stealing and so forth, although not identical with or similar to criminal acts charged, if the defendants conspired to commit the unlawful act in the manner in which it was performed would reasonably and likely produce the death of another, then each conspirator is equally guilty as the [6210] principal offender of the homicide although such conspirator, or person, or defendant, aider and abettor was neither present or had knowledge of the physical killing or the weapon used.

Now, a person acts purposely when the gist of the offense is a prohibition of conduct against a certain nature regardless of what the offender intends to accomplish thereby, if it is his specific – pardon me – if it is the specific intention and purpose to engage in the act of that nature and he has a conscious objective of producing a specific result, or engaging in the specific course of conduct, or specific conduct to do an act. Purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

The purpose with which a person does an act is known only to himself unless he expresses it to others, either orally or indicates it by his conduct. The purpose with which a person does an act or brings about a certain result is determined by the manner in which it is done, the means used, or the weapon used and any and all facts and circumstances in evidence. Now, if a wound is inflicted on a [6211] person with a deadly weapon in the manner calculated to destroy life and inflict great bodily harm, the purpose and intent to kill may be inferred from the use of the weapon.

The Court has used the word deadly weapon. A deadly weapon is an object or instrument which is capable of inflicting death. And in determining whether or not a gun or instrument was used in this particular case, you will consider the evidence, consider the nature of the instrument, its capability to inflict deadly harm and the manner in which you find it is used from this evidence and in this case from all of the evidence.

Now, ladies and gentlemen, proof of motive is not required. The presence or absence of motive is one of the

circumstances bearing upon intent and purpose. The word unlawful as used in the statute means contrary to law.

Now, ladies and gentlemen, the Court will continue – I'll have to do it exactly the way I did it.

Ladies and gentlemen, the Court will continue this and I would indicate that I'm [6212] defining the element of aggravated robbery and kidnapping in a few minutes.

Purpose is also an element involved in aggravated robbery and kidnapping, so some of these instructions will be read for all crimes.

Now, as to the prior calculation and design, prior calculation and design is an essential element of the crime of aggravated murder. Prior calculation and design means the purpose to kill was reached by the defendants through a definite process of reasoning in advance of the killing, which process of reasoning must have included a mental plan involving steady consideration of the method the person or instrument in which to kill another or the weapon used to kill another. No definite period of time must elapse and no particular amount of consideration must be given to the prior calculation and design to kill, but acting on the spur of the moment, or after momentary consideration of purpose to kill is not sufficient to constitute the crime of prior – the element, rather, of the crime, the element of prior calculation and design, which is required for aggravated murder.

[6213] If you find from the evidence that the defendants and/or co-conspirators and/or aider and abettor, in complicity, actually formed the purpose to kill and that purpose was arrived at with a prior calculation and design before he or she performed the acts, that is sufficient for the element – for this element of the crime of aggravated murder.

Proximate cause is an essential element of the crime of aggravated murder. Proximate cause is an act which in the natural and continuous sequence produces the result and without which it would not have occurred, that is the death of Henry Podborny. Proximate cause exists when the death is the natural and probably [sic] effect of – or the result of the act or the defendant's actions.

In this cae [sic] the death of Henry Podborny must be such as it would naturally and logically and proximately result from the defendants, the co-conspirator, aider and abettor, in complicity acts, and that these acts had to be such that would be reasonably anticipated by an ordinary prudent man as to likely result in death, if you find it was the use of a deadly weapon, or an [6214] instrument was used in the evidence.

Venue is an essential element of the crime charged in the indictment. Therefore, the State must prove that the crime took place on or about the 29th day of January, 1981, in Cuyahoga County, Ohio.

Now, in conclusion, ladies and gentlemen, as to aggravated murder, if you find that the State has proven beyond a reasonable doubt each and every essential element of the crime of aggravated murder under 2903.01, as I just explained it to you, your verdict must be guilty as charged. If on the other hand you find the State has failed to prove beyond a reasonable doubt each and every

essential element of aggravated murder, that I have just explained to you, or failed to prove any one of these elements against these defendants, then you must find the defendants not guilty and return a verdict of not guilty of aggravated murder.

The Court at this time has repeated it verbatim from the charge that I have given you as it reflects. And have I answered your question?

Do you want to take the jury out [6215] again.

(Thereupon, the jury was excused to the jury deliberation room to resume their deliberating.)

(Thereupon, the jury was returned to the jury box and the following proceedings were had:)

THE COURT: The Court at this time is going to interrupt your deliberations for about an hour and a half. It is my understanding that matters – one definite personnel matter, which the Court feels mandates and militates the interruption of the jury deliberations. You are going to go downstairs with Helen DiSalvo and we will be coming for you to come back here at about an hour and a half from here, 4:30, it's about a little more than an hour and a half, it's ten to three. You are not to discuss the case among yourselves unless you are sitting deliberating in the jury room as a body. This includes while you are away, especially if anyone interferes with your services as a jury, kindly tell the Court about it to my bailiff and with that, [6216] Dan, you want to take them down.

(Thereupon, the jury was excused from deliberating until 4:30.)

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 44551

STATE OF OHIO, PLAINTIFF-APPELLEE, - VS - ROBERT O'NEAL, DEFENDANT-APPELLANT.	:	JOURNAL ENTRY and OPINION FEE & TAXES

DATE OF ANNOUNCEMENT OF DECISION: JUL. 25, 1985

CHARACTER OF PROCEEDING:	Criminal Appeal from the Common Pleas Court, Case No. CR-n63540
JUDGMENT:	Judgment affirmed.
DATE OF JOURNALIZATION:	Sep. 4, 1985
APPEARANCES: For Plaintiff-Appellee:	John T. Corrigan, Prosecuting Attorney of Cuyahoga County, Ohio; Carmen M. Marino, Asst. Prosecuting Attorney The Justice Center, 1200 Ontario Cleveland, Ohio 44113

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O'NEILL, P.J.

The appellant, Robert O'Neal, was indicted for aggravated murder, aggravated robbery and kidnapping. He came on for trial with co-defendants, Lloyd Allen and Dimple Podborny. At the conclusion of the trial, the jury returned guilty verdicts on all charges, not only for this appellant but for his two co-defendants. The appellant was sentenced to life and two 7-25 years sentences. A timely notice of appeal was filed with this court.

The first assignment of error complains that the appellant was denied a fair trial and his right to trial by a jury drawn from a representative cross-section of the community. When the State used its peremptory challenges to remove prospective jurors on the sole ground of group racial bias. The appellant brings to our attention the fact that the State, in the exercise of its peremptory challenges, excused seven blacks from the jury.

During the voir dire process, counsel for the appellant joined in a motion for mistrial and called to the court's attention that, out of six peremptories that the State had exercised, four black persons had been excused (Tr. 1237, 1240). After a short informal discussion, the court overruled the motion.

The essential nature of a peremptory challenge is that it is one exercised without a reason stated, without inquiry, and without being subject to the court's control.

Lewis v. U.S., 146 U.S. 370, 378. The peremptory challenge is frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. *Swain v. Alabama*, 380 U.S. 202, 221. In discussing the purpose and use of the peremptory challenge, the *Swain* court, at page 221, wrote "for the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is, in fact, partial, but whether one from a different group is less likely to be. It is well known that these factors are widely employed by both prosecutor and accused. Hence, veniremen are not always judged as individuals for the purpose of exercising peremptory challenges. Rather, they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations in the context of the case to be tried. With these considerations in mind, we cannot hold that the striking of negroes, in a particular case, is a denial of equal protection of law."

In concluding the discriminatory exclusion argument under peremptory challenges, the *Swain* court went on to hold "the presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not over-come and the prosecutor therefore subjected to examination by allegations that in the case at hand all negroes were removed from the jury or that they were removed because they were negroes." It is our conclusion that the expressions in the *Swain* case are totally applicable and dispositive of this assignment of error. The appellant agrees in his brief that the *Swain*

burden has proved insurmountable and that he would not be able to comply with that burden. However, appellant goes on to argue that the method in which the prosecutor exercised his peremptory challenges denied the appellant his state constitutional and sixth amendment right to trial by a jury drawn from a representative cross-section of the community. In furtherance of this assignment of error, the appellant calls our attention to Article 1, Sec. 5 and Sec. 10 of the Ohio Constitution. Section 5 provides that the right of a trial by jury shall be inviolate and Sec. 10 provides that the defendant was entitled to a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed. Apparently, the appellant would have us rule that in any criminal case, in which the defendant is a black person, the only impartial jury before whom he might be tried must be composed of a black majority. We can think of no intelligent reason to make such an assumption. Each of the twelve members of the jury chosen in this case, during the voir dire proceeding and as a part of their oath, promised that they would faithfully and impartially discharge their duties as jurors. This action, on the part of the jurors, raises an inalterable fact rather than a presumption. In the case of *Taylor v. Louisiana*, 42 L. Ed 2d 690, the United States Supreme Court concluded that a state constitution and statute, which systematically excluded women from jury duty, was unconstitutional and in violation of the Sixth Amendment for the reason that such a jury was not drawn from a fair cross-section of the community. In *Taylor*, the Supreme Court (p. 703) made a statement rather applicable to the

case at hand. "It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community, we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." No charge is raised in this case that the selection of prospective jurors involved any patent discrimination. This first assignment of error is overruled.

Assignment of error number four is that during the examination of a police officer, the prosecutor asked the court to direct all parties to refrain from asking why appellant's gun had been initially confiscated by the East Cleveland Police Department. The court ordered all parties not to examine witnesses concerning why appellant's gun had been confiscated. The jury was to know only that it was returned to him on January 6, 1981.

Appellant's gun had initially been confiscated because he was involved in a homicide. As a result of that investigation, he was charged with voluntary manslaughter, but the charge was eventually dismissed. During cross-examination of the appellant, in spite of his previous order, the court permitted the prosecutor to extensively cross-examine the appellant about the details surrounding the manslaughter case. The appellant contends that this amounted to a violation of the order in limine and was also erroneously the admission of evidence of other crimes, wrongs or acts.

During direct examination, the appellant raised the issue of the East Cleveland incident. As a part of his testimony, he testified that he had received $6500.00 to buy a liquor license and that that money was eventually

used to pay an attorney for a "little problem in East Cleveland with Judge Devinne to get the firearm back. He threw it out of court." He went on to testify that the gun which was returned to him was registered and that it was a crime in East Cleveland to have an unregistered gun. During examination by one of the other defense counsel, appellant stated that the gun had been taken from him on one day and returned the next day. The State argues that it was the appellant who opened the door on the East Cleveland incident and that it was deliberately done to convince the jury that the appellant had a gun but that the gun was registered and that he would be a fool to kill anybody with a registered gun. The State further points out that when the appellant testified that the gun was returned to him, on the day after which it was seized, he was lying. The State had absolute knowledge that the gun was seized on June 5, 1980 and returned to the appellant on January 6, 1981. When one considers the record, it is obvious that the State, in their active cross-examination as to the East Cleveland incident, was primarily attempting to attack the credibility of the defendant-appellant, rather than attempting to bring to the jury's attention other acts of the defendant. In their introduction of testimony, it was necessary that the State bring to the attention of the jury that the appellant, as to the East Cleveland incident, was released from any charges brought therein. Reason would say that such evidence would do nothing to prove the character of the appellant in order to show that he acted in conformity therewith. It is more plausible to assume that the prosecution was conducting a cross-examination on a relevant matter affecting credibility, the door to which had been actively

opened and pursued by the appellant himself. Accordingly, we find this assignment of error to be without merit.

The second assignment of error complains that the appellant was denied his constitutional right to a fair trial by the admission of gruesome, inflammatory photographs.

Initially, the appellant complains that the court erred in admitting, over objection, eighteen (18) photographs of the remains of the decedent taken by the coroner, and two (2) photographs depicting the decedent's remains located in a field. The court also, over objection, permitted the introduction as exhibits of the actual cloth and various coverings which were found on the body. The court also allowed, over objection, the admission of a portion of skin removed from the appellant's finger and produced at trial in a liquid in a brown bottle. There is no argument as to the relevancy of these exhibits, but rather an argument that the court should have excluded some of them because their probative value outweighed the danger of prejudice.

The mere fact that a photograph is gruesome or horrendous is not sufficient to render it inadmissible if the trial court, in the exercise of its discretion, feels that it would prove useful to the jury. Evidence had been presented that, when the decedent's body was found, he had been dead for some weeks. State's exhibits 1(A) through 1(Q), being photographs of the decomposed remains of the decedent, are relevant and contribute to proof that the decedent had been dead for a prolonged period of time before his body was found. The piece of finger skin,

removed from the decomposed remains, was used to establish the identification of the decedent. In the chain of evidence, the identifying finger skin was relevant to the decomposed remains. The decomposed remains were relevant to proof that the body had lain for a long time in a secret place. Perhaps the number of photographs (18 of the decomposed remains) was somewhat excessive, but we consider the importance of its relevancy to far-out way the danger of unfair prejudice or confusion. We reach the same conclusion as to the introduction of the decedent's clothing. As an additional point, we find that amongst this clothing there was also introduced some other articles which were strongly relevant and indicative of an attempt to hide the body and we find that this is relevant to the case and not abusive. Over objection, the State also introduced a crow bar which was found in a bar owned and operated by the appellant, O'Neal. We can find no relevancy amongst the evidence which would connect this crow bar with the case. The prosecution argues that there was testimony that the decedent had been bludgeoned and shot and that perhaps this crow bar was used in that attack. We find this argument to be weak and conclude that the admission of this crow bar was erroneous. However, we do not conclude that, in view of all of the other evidence in the trial, that the admission of this exhibit was so prejudicial as to justify a reversal.

The third assignment of error complains that appellant was denied his right to a fair trial and his right to confront and cross-examine an adverse witness when the trial judge permitted an FBI agent to refuse to answer questions directed at him under cross-examination. Co-defendant, Dimple Podborney [sic], subpoenaed and

examined an FBI Agent, Graessle. The appellant attempted cross-examination of this witness, however, the witness refused to answer any questions and a United States Attorney explained to the court that the agent was not authorized to answer any questions posed by the appellant. In Volume 28 of the Code of Federal Regulations and especially at Sections 1621 et seq., a party desiring to secure information from an agent of the justice department may make application with the Attorney General of the United States, setting forth in said application the information which the party desires to elicit. It is then up to the justice department to decide whether such agent will be permitted to disclose the desired information. Further on under this chapter of the Federal Regulations, a procedure is set forth whereby a denial of such information may be administratively appealed. This appellant had made no such application to the Justice Department. The United States Supreme Court has considered this regulation in the case of the *United States of America ex rel Rodger Touhy* v. Ragen, 340 U.S. 462, and concluded that such regulation is valid. The regulation does not prohibit nor preclude the disclosure of information by a government agent but rather regulates it and with good reason.

> "When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness indeed the necessity of centralizing determination *** is obvious." *United States of America* ex rel Rodger Touhy v. Ragan, 340 U.S. 462, 467.

In the case at hand, the appellant could have but did not subpoena the FBI Agent. The appellant could have but did not submit the required application to the Justice Department. The appellant could have but did not request a continuance of the trial so that he could pursue the application requirement. In the case of *United States* v. Marino (C.A.6, 1981), 658 F. 2d 1120, the court concluded that the question of whether the procedure set forth in the Code of Federal Regulations denies a defendant a Sixth Amendment right to call and cross-examine witnesses is not reached until the defendants follow the procedures and then have their demands denied (p. 1125). Accordingly, we conclude that this assignment of error is without merit.

The fifth and sixth assignments of error complain that the appellant was denied a fair trial by the court's instructions on complicity and instructions on conspiracy when, in fact, the appellant was never charged with conspiracy.

During the conduct of the trial and especially during instructions, there were repeated references to and definitions made thereof in spite of the fact that the appellant was not charged with the statutory crimes of conspiracy and complicity. We have previously faced this same issue in the case of *State of Ohio v. Dimple Podborny,* (Cuyahoga County C.A. Case No. 44574) and *State of Ohio v. Lola Gail* Toney, (Cuyahoga County C.A. Case No. 44220). Our consensus in those two cases was that the State is not obliged to charge a defendant under R.C. 2923.01, where the substantive crime charged was committed as the result of a conspiracy. The conspiratorial conduct becomes the vehicle by which the crime is executed

thereby making all the co-conspirators liable for the substantive crime. In further support of our conclusion, we draw attention to the case of the *United States v. Hoffa* (C.A. 6), 349 F.2d 20. In Headnote 30 of that case, the Court of Appeals noted that "conspiracy may be shown as an evidentiary fact to prove participation in the substantive crime."

Accordingly, we find that assignments of error number five and six are without merit and the judgment of the trial court is affirmed.

Judgment affirmed.

JOURNALIZED SEP. 4, 1985
GERALD E. FUERST, Clerk of Courts
By /s/ JAC Deputy

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

_/ STILLMAN, J., dissents. See Dissenting Opinion.

*/ DONOFRIO, J., concurs.

/s/ Joseph E. O'Neill
PRESIDING JUDGE

*/SITTING BY ASSIGNMENT: */JOSEPH O'NEILL

SAUL G. STILLMAN, Ret'd. J. of the Eight Appellate District.

JOSEPH DONOFRIO, J. of the Seventh Appellate District.

JOSEPH E. O'NEILL, J. of the Seventh Appellate District.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 44551

STATE OF OHIO Plaintiff-Appellee	:	
-vs-	:	DISSENTING
ROBERT O'NEAL Defendant-Appellant	:	OPINION

DATE: JUL 25, 1985
STILLMAN, J., DISSENTING:

For the reasons which I have indicated in my dissenting opinion in *State of Ohio vs. Dimple Podborny*, Court of Appeals Case No. 44574, I respectfully dissent in this case as well.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 44574

State of Ohio,
Plaintiff-Appellee

Vs.

DISSENTING OPINION

Dimple Podborny,
Defendant-Appellant

DATE: Jul 30, 1985

STILLMAN, J. DISSENTING:

I find it necessary, respectfully, to dissent from the majority in the light of *State v. Henry*, 4 O. St. 3d, 44 (1983) and the strict mandatory requirements of Criminal Rule 14 and R.C. 2945.20.

In *Henry*, the Supreme Court of Ohio declared that "where two or more persons are jointly indicted for aggravated murder, each of such persons shall be tried separately, unless the trial court orders a joint trial pursuant to the strict mandates set forth in Criminal Rule 14 and R.C. 2945.20."

Criminal Rule 14 recites in pertinent part:

> "When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately, unless the court orders the defendants to be tried jointly, upon application by the prosecuting attorney or one or more of the defendants, and for good cause shown."

R. C. 2945.20 provides:

> "When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately. The court, for good cause shown on application therefore by the prosecuting attorney or one or more of the defendants, may order said defendants to be tried jointly."

The record does not indicate any compliance with the requirements of Criminal Rule 14 and R. C. 2945.20.

The defendants, Robert O'Neal and four others, Gary Gabbard, Lola Toney, Dimple Podborny and Lloyd Allen were tried for aggravated murder and other offenses arising from the death of Henry Podborny. O'Neal was tried jointly with Dimple Podborny and Lloyd Allen. The remaining defendants were tried together in a separate trial. Counsel for O'Neal moved for a separate trial on two occasions prior to trial. The motions were overruled. The Prosecuting Attorney filed no motion for a joint trial.

Much as I deplo e the necessity for retrials, I am persuaded by the language of the *Henry* case that separate trails of the indicted individuals in the Podborny cases are mandated.

The entry filed in *State v. O'Neal* on September 23, 1981 recites, "Hearing had on Motion for Separate Trials; Evidence taken; Motion Denied . . . "

Footnote 4 of the *Henry* opinion at page 46 declares that the defendants "did not bear the burden of requesting separate trials" and the court reached the conclusion that " . . . because neither the state nor appellee Henry applied and sought affirmative approval for a joint trial for good cause shown pursuant to Crime. R. 14 and R.C. 2945.20, we . . . remand the cause for a new trial wherein Long will be tried separately." Any effort to validate the

joint trials held here would require a gross distortion of the language in *State v. Henry*.

Moreover, the guilt by association inferences which are implicit in the Criminal Rule and Revised Code is reinforced dramatically by the manner in which this case was tried. The reference by the majority opinion to the character of two of the co-defendants as unworthy of trust underscores this consideration.

I also find merit in the eighth assignment of error which again demonstrates the validity of separate trial requirements in capital cases. If an individual defendant is to be convicted because of the mental state of co-defendants, the right to a fair trial and due process of law is seriously compromised.

For the reasons stated, I find that I cannot regard the failure of the prosecuting attorney to apply for a joint trial to be merely a procedural error. A capital case should be prosecuted in strict accordance with the applicable rules and the abuses concomitant with a joint trail were clearly evident in the case *sub judice*.

I, therefore, dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,

Petitioner,

vs. CASE NO. C-1-86-0976

TERRY MORRIS,

Respondent

NOTICE

Attached hereto is the Report and Recommended Decision of the Honorable Robert A. Steinberg, United States Magistrate Judge, which was filed on January 22, 1992. Any party may object to the Magistrate Judge's findings, recommendations and report within ten (10) days after being served with a copy thereof or further appeal is waived. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Such parties shall file with the Clerk of Court, and serve on all parties, the judge and the Magistrate Judge, a written Motion to Review which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made, along with a memorandum of law setting forth the basis for such objection. (Such parties shall file with the Clerk a transcript of the specific portions of any evidentiary proceedings to which an objection is made).

In the event a party files a Motion to Review the Magistrate Judge's Findings, Recommendations and Report, all other parties shall respond to said Motion to

Review within ten (10) days after being served a copy thereof.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,

Petitioner,

vs Case No. C-1-86-0976

TERRY MORRIS,

Respondent

REPORT AND RECOMMENDATION

Petitioner Robert O'Neal, a prisoner at the Chillicothe Correctional Institute in Chillicothe, Ohio, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on the petition, the return of writ, the parties' submissions of exhibits and supplemental briefs, as well as evidence and legal arguments presented during two hearings. (Docs. 1, 10, 12, 14, 20, 22, 24, 25, 31, 34, 38, 41, 47, 49, 57, 58, 59, 63, 65, 67).

Procedural Background

On March 27, 1981, O'Neal and five others were indicated by the Cuyahoga County, Ohio grand jury on one count of aggravated murder as defined in Ohio Rev. Code § 2903.01, one count of kidnapping as defined in Ohio Rev. Code § 2905.01, and one count of aggravated robbery as defined in Ohio Rev. Code § 2911.01. (Doc. 10, Ex. B). On July 17, 1981, in a separate trial, a jury found two defendants, Lola Gail Toney and Gary Gabbard, guilty as charged. *Id.*, Ex. E, p. 2; Tr. 1735; *see also Ohio v. Gabbard*, No. 44207, unreported slip op. (Ohio App. Oct. 25, 1984). Another co-defendant, Leland Waress, pleaded guilty to one count of conspiracy to commit kidnapping. (Doc. 10, Ex. E, p. 2; Tr. 5123).

From September 1, 1981 through October 10, 1981, O'Neal and two co-defendants, Lloyd Allen and Dimple Podborny, were tried before a jury. The jury found them guilty as charged in the indictments. The court sentenced O'Neal to a life term of imprisonment for aggravated murder, a seven (7) to twenty-five (25) year term for aggravated robbery, and a seven (7) to twenty-five (25) year term for kidnapping. *Id.*, Ex. A.

O'Neal pursued unsuccessful appeals in the Ohio Court of Appeals, Eighth Appellate District, and in the Ohio Supreme Court. (Doc. 10, pp. 2-4).

O'Neal then filed his pro se petition for a writ of habeas corpus in this Court raising eight grounds for relief. (Doc. 1). We appointed counsel from the Ohio Public Defender's Office to represent O'Neal. (Doc. 26).

O'Neal contends that since he was charged with a capital offense, he could not be tried with his co-defendants absent strict compliance with Ohio R. Crim. P. 14 and Ohio Rev. Code § 2945.20. (Doc. 1, p. 5). He claims that the prosecutor improperly exercised his peremptory challenges to excuse jurors solely on the basis of their race. (Doc. 31, pp. 9-21). He also argues that he was denied his rights under the fourteenth amendment when the Ohio Court of Appeals failed to address an issue he raised in his memorandum in support of his appeal. (Doc. 49, pp. 6-7, 9).

The majority of O'Neal's claims, however, concern his contention that he was denied his right to a fundamentally fair trial under the due process clause of the fourteenth amendment. O'Neal argues that the effect of five trial errors, when considered both alone and cumulatively, deprived him of a fair trial. These five alleged errors concern two claims of constitutionally defective jury instructions, denial of his rights under the confrontation clause of the sixth amendment, prosecutorial misconduct, and the prejudicial admission of inflammatory evidence. *Id.* at 8-9.

Factual Background

The charges against O'Neal arose from the events leading to and surrounding the death of Henry Podborny, the owner and manager of the West Point Pallet Company in Chicago, Illinois. On January 29, 1981, Mr. Podborny's estranged wife lured him from his home near Chicago, Illinois to Cleveland, Ohio by pretending she wanted to

resolve their marital difficulties. On April 24, 1981, his dead body was discovered in a field in Cleveland, Ohio.

The six individuals charged with the kidnapping, robbery, and murder of Mr. Podborny were O'Neal, the owner of an unlicensed saloon[1] in Cleveland; Lloyd Allen, O'Neal's employee and friend; Dimple Podborny, Mr. Podborny's wife; Lola Gail Toney, Mrs. Podborny's daughter-in-law by a prior marriage and O'Neal's friend, whom O'Neal had employed as a bookkeeper for a number of years in the past (Tr. 1749-50); Gary Gabbard, Toney's brother; and Leland Waress, an acquaintance of Mrs. Podborny. James McLean was also a member of the group involved in the plot against Mr. Podborny. McLean assisted law enforcement authorities in their investigation and testified at O'Neal's trial. He was not charged. (Tr. 3236).

The following facts are, in many respects, disputed. However, the version presented is supported by substantial evidence and is consistent with the jury's verdict. The events leading to the death of Mr. Podborny began in May 1980 when Mrs. Podborny asked her son's wife, Toney, if she knew anyone who could provide her with physical protection from Mr. Podborny. (Tr. 1762-63; 5349-50). Between 1969 and 1979, Mrs. Podborny's marriage to Mr. Podborny had been "perfect." (Tr. 5349). In 1980, however, the Podbornys experienced martial problems and separated. (Tr. 5350-51). In May 1980, Mrs.

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[1] During the evidentiary hearing the parties agreed that O'Neal's saloon, referred to in the record as a restaurant, a bar, a "cheap spot" or a "cheat spot," was an unlicensed saloon where liquor was sold after hours.

Podborny and her children from a prior marriage began receiving threats, apparently from individuals who were following the instructions of Mr. Podborny. (Tr. 5349). As a result of these threats, Mrs. Podborny informed Toney that she wanted to hire someone to protect her. (1762-63).

Toney then contacted McLean, whom she had met when she began working for O'Neal. (Tr. 1752). Toney and McLean devised a plan wherein she would introduce McLean to Mrs. Podborny as "Stan," a man with connections to organized crime, in order to convince Mrs. Podborny to pay $5,000 for physical protection. (Tr. 1768-76).

In June 1980, Toney and McLean met Mrs. Podborny and one of her daughters in Richfield, Ohio. Mrs. Podborny agreed to pay McLean $5,000, and asked him to hold her ring as collateral while she returned to Chicago to obtain the money. After the meeting, Toney and Mrs. Podborny travelled to Chicago where Mrs. Podborny paid Toney $5,000. Toney later gave McLean $2,500 as his share. (Tr. 1770-82, 2947-55, 2962-64).

In July 1980, McLean persuaded acquaintances to make threatening telephone calls to Mrs. Podborny to convince her that she continued to need protection. (Tr. 2964-66). In August 1980, Mrs. Podborny paid Toney an additional $10,000 for protection. Toney, in turn gave McLean $2,000. (Tr. 2981-82). Mrs. Podborny paid Toney because she was terrified, she believed her life was in danger, and she trusted Toney. (Tr. 5357-59).

In August 1980, Toney travelled to Chicago and met with Mrs. Podborny. Mrs. Podborny informed Toney that she wanted to hire someone to murder Mr. Podborny. (Tr. 1784-86). Toney contacted McLean to discuss the amount

they would charge Mrs. Podborny for arranging the killing.[2] They also planned to tell Mrs. Podborny that "Sonny" (a non-existent person) would kill Mr. Podborny.[3] A few days later, Mrs. Podborny paid Toney $24,400. Toney later gave McLean $1,000. (Tr. 1784-1818; 2966-29).

According to Toney, she telephoned O'Neal, her longtime friend and former employer. O'Neal travelled to Chicago. O'Neal and Toney discussed the fact that Mrs. Podborny wanted to have her husband killed. Toney claimed she gave O'Neal $6,500. (Tr. 1807-08; 1818-19; 4043-45; 4840-41). O'Neal had met Mr. and Mrs. Podborny about eight years earlier. At that time, Toney was O'Neal's bookkeeper in Cleveland. Toney introduced O'Neal to Mrs. Podborny apparently because Mrs. Podborny wanted to purchase a saw from O'Neal. Following the sale, O'Neal delivered the saw to the Podbornys' home near Chicago where he met Mr. Podborny. Between that time and August 1980, O'Neal did not again encounter Mr. Podborny. (Tr. 1826-27; 4835-37). Toney claimed she arranged a meeting between O'Neal and Mrs. Podborny, apparently during August of 1980. At that meeting, Toney alleged O'Neal pretended to be employed by

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[2] Toney disputed the fact that she and McLean intended to arrange the killing of Mr. Podborny. Toney, an admitted liar, Tr. 2120, repeatedly testified that she only pretended to arrange the killing in order to obtain more money from Mrs. Podborny. *See, e.g.*, Tr. 1790.

[3] Toney also knew a "loan shark" named Sonny Pace. She testified, however, that Sonny Pace and the fictional "Sonny" were not the same person. (Tr. 1808-09; *see also* 3064-65).

"Sonny" to protect Mrs. Podborny from her husband. (Tr. 1820-21).

In late August 1980, Toney travelled to Chicago in order to calm Mrs. Podborny, who was upset because Mr. Podborny had not yet been killed. Mrs. Podborny informed Toney that she wanted Mr. Podborny killed at his business rather than at home. (Tr. 1798). In early September 1980, McLean travelled to Chicago and met with Toney and Mrs. Podborny. They discussed her impatience with the inaction. McLean suggested poisoning Mr. Podborny, but Mrs. Podborny rejected this idea. (Tr. 1812-13). Following the meeting, McLean and Toney reconnoitered Mr. Podborny's pallet company in order to plan a robbery. (Tr. 1813). Toney carried a .38 caliber revolver during the reconnaissance. (Tr. 3243-44).

In September 1980, Mrs. Podborny filed a petition for dissolution of marriage. (Tr. 1806, 5352). In her petition for dissolution, she alleged that her husband and two others were conspiring to murder her. (Tr. 5352-53).

In late September 1980, Mrs. Podborny left her home near Chicago and moved to Cleveland to live with her son and Toney. (Tr. 1822-23). Toney alleged she spoke with O'Neal nearly every day during this time. Although O'Neal was experiencing financial difficulties, she said she did not give him any more money. (Tr. 1822-23).

After living in Cleveland for several weeks, Toney and Mrs. Podborny drove to Chicago for two days to attend a hearing in connection with the dissolution action. Toney alleged that O'Neal and Allen also travelled to Chicago at this time. Toney, Allen, and Mrs. Podborny attended the hearing, during which the court gave Mrs.

Podborny permission to re-enter her Chicago home to retrieve her property. O'Neal did not attend the hearing. Following the hearing Toney, Allen and Mrs. Podborny went to the Podborny residence. O'Neal did not accompany them. When they arrived at the house, Mr. Podborny and several grandchildren were there. At some point, Mr. Podborny experienced a heart attack. Paramedics were summoned and he survived. Later that evening, O'Neal allegedly asked Mrs. Podborny why she had not let Mr. Podborny die. Mrs. Podborny responded that she could not because the grandchildren were present. O'Neal, Toney, and Mrs. Podborny returned to Cleveland together. (Tr. 1824-1832).

During November 1980, Mr. Podborny frequently telephoned Mrs. Podborny. (Tr. 1834). Toney and O'Neal allegedly talked "just about daily," because he was still experiencing financial difficulties. *Id.*

In December 1980, Mrs. Podborny asked Toney to contact Leland Waress, an individual with connections to the Hell's Angels motorcycle club, to ask him to arrange to have Mr. Podborny killed. (Tr. 1836-37). They also discussed kidnapping Mr. Podborny as a method for obtaining access to his money. (Tr. 1842-44). In January 1981, Toney met Waress and discussed not only having Mr. Podborny killed by a member of the Hell's Angels, but also a number of other plans, including a plan to kidnap Mr. Podborny and hold him in the basement of O'Neal's saloon in Cleveland. (Tr. 1840).

The conspirators eventually decided to have Mrs. Podborny lure Mr. Podborny to Cleveland under the guise of reconciling their marital problems. While Mr.

Podborny was in Cleveland, Toney claimed O'Neal would kidnap and hold Mr. Podborny in the basement of his saloon while the others robbed the Podborny residence and the pallet company in Chicago. (Tr. 1836-1851). They would then return Mr. Podborny to Chicago, where he would be "given some medication and some whiskey and turned loose." (Tr. 1842).

At some point, Toney contacted her brother, Gary Gabbard, to obtain his help in robbing Mr. Podborny's residence and business. Waress told Gabbard that Toney had suggested that one way to avoid problems following the robbery was to murder Mr. Podborny. (Tr. 5173-5239). Gabbard agreed that killing Mr. Podborny was a possibility, because "dead people don't talk." (Tr. 5229).

In late January 1981, Toney and Waress met in Independence, Ohio. Toney told Waress that O'Neal had agreed to hold Mr. Podborny while the others robbed his residence and business. She showed Waress a list of Mr. Podborny's bank accounts and the amount of money in each account. They discussed the possibility of having McLean pose as Mr. Podborny after the kidnapping and murder, because McLean resembled Mr. Podborny. Following this meeting, Waress was excluded from the plan, apparently because the others decided they did not need him. Although Waress attempted to locate Toney and O'Neal, he was never able to do so. (Tr. 5173-5239).

Toney testified that, on January 29, 1981, the following events occurred. Mr. Podborny flew to Cleveland, Toney met him at the Cleveland airport and drove him to O'Neal's saloon. Toney left Mr. Podborny in front of the saloon and watched him enter. Between five and ten

minutes later, O'Neal exited the saloon and entered Toney's automobile. O'Neal gave Toney Mr. Podborny's wallet, his traveler's checks, a credit card, and his keys. Toney took money from Mr. Podborny's wallet and gave it to O'Neal. She then drove around a nearby corner and stopped. (Tr. 1855-66; 1882-95). A few minutes later, Allen entered the car and told Toney that he had struck Mr. Podborny with a pipe so that he could not run. (Tr. 1962). The trio did not discuss further what had happened inside the restaurant. Toney understood that Mr. Podborny "was secure. He wouldn't get loose." (Tr. 1863). Toney then drove O'Neal and Allen to another saloon. She left them and proceeded alone to a restaurant, where she telephoned McLean. Toney and McLean met in Richfield, Ohio, where Toney gave McLean Mr. Podborny's traveler's checks, credit card, and driver's license. They discussed several plans to obtain the money from Mr. Podborny's bank accounts. Later that evening, Toney gave Mrs. Podborny the wallet and keys. (Tr. 1855-96).

On January 30, 1981, Toney, Mrs. Podborny, Gabbard, and three others drove to Chicago. Toney, Mrs. Podborny, and Gabbard went to Mr. Podborny's home, where they found firearms and two coin containers. They also went to the pallet company, where Mrs. Podborny opened a safe, but did not find any money. They then returned to Cleveland. (Tr. 1896-1909).

During February and March 1981, Toney, Mrs. Podborny, and McLean attempted to obtain money from Mr. Podborny's bank accounts by establishing a back account in Ohio under the name "Dimple Pallet Company" and transferring money from Mr. Podborny's bank accounts in Chicago to the Ohio account. (Tr. 1928-29; 1934-38;

3017-25). To avoid arousing suspicion over Mr. Podborny's disappearance, Toney, McLean, and Mrs. Podborny attempted to make it appear as though Mr. Podborny was travelling in different areas of the country. To this end, McLean, who resembled Mr. Podborny, flew to Florida posing as Mr. Podborny. Mrs. Podborny and Toney fabricated a letter that appeared to have been written and mailed by Mr. Podborny from Buffalo, New York. Mrs. Podborny later assured an employee at the pallet company that Mr. Podborny was in Florida and that she had received a letter from him that he mailed from Buffalo, New York. (Tr. 1930-1956).

O'Neal allegedly told Toney during February and early March 1981 that Mr. Podborny "was okay." (Tr. 1934, 1939). She informed McLean that O'Neal "wanted $500.00 for keeping Hank." *Id.* Toney claimed she gave O'Neal $300 in mid-March 1981. (Tr. 1941-45). By late March, Toney believed that Mr. Podborny was no longer alive. (Tr. 1945-46). The record is not clear why she reached that conclusion. *See id.*

In mid-February 1981, McLean was arrested by FBI agents for forging Mr. Podborny's traveler's checks. McLean informed the agents that he knew about the disappearance of Mr. Podborny, and he agreed to assist them in locating him. On several occasions between March 17, 1981, and March 25, 1981, McLean met with Toney. With McLean's consent, the FBI recorded their conversations. The tapes, containing information regarding the participation of Toney and Gabbard in Mr. Podborny's kidnapping and murder, were admitted into evidence at O'Neal's trial. (Tr. 4783-90). (Doc. 10, Ex. D, p. 7).

On April 24, 1981, a dead body was found in a field in Cleveland. *Id.* On April 25, 1981, Dr. Lester Adelson, of the Cuyahoga County Coroner's Office, performed an autopsy on the body. (Tr. 3707). He determined that the victim had been struck at least five times in the head, and shot once in the forehead. (Tr. 378-09). The combination of these injuries caused death. (Tr. 3715). The victim had been dead "for a period of at least weeks." (Tr. 3711). Dr. Adelson examined the entire body and did not discover any injuries below the neck. (Tr. 3717). The body was later identified as Henry Podborny. (Tr. 3630-33).

OPINION

I. O'Neal's First Claim Is Not Cognizable In Federal Habeas Corpus

O'Neal argues that since he was charged with a capital offense, he could not be tried with his co-defendants absent strict compliance with Ohio R. Crim. P. 14 and Ohio Rev. Code § 2945.20. (Doc. 1, p. 5; Doc. 12, p. 5, Doc. 49, p. 11).

A federal court may review a state prisoner's habeas corpus petition only on the ground that the challenged confinement violates the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a). A federal court may not issue a writ of habeas corpus "on the basis of perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Smith v. Sowders*, 848 F.2d 735, 738 (6th Cir.), *cert. denied*, 488 U.S. 866 (1988).

O'Neal's first claim is not cognizable in the instant action, because he seeks to raise an issue of state law –

whether the trial court erred in denying his motion for a mistrial under Ohio R. Crim. P. 14 and Ohio Rev. Code § 2945.20.

II. O'Neal's Challenge To The Racial Composition Of The Petit Jury Cannot Be Recognized

O'Neal argues that his rights under the sixth and fourteenth amendments were violated when State's counsel exercised his peremptory challenges to exclude six individuals from the petit jury solely on the basis of race. (Doc. 31, pp. 9-21). O'Neal concedes that *Batson v. Kentucky*, 476 U.S. 79 (1986), does not apply retroactively to the instant action, leaving him the "insurmountable" burden of establishing a prima facie case of racial discrimination under the standards of *Swain v. Alabama*, 380 U.S. 202 (1965). *Id.* at 13-16. Consequently, rather than mounting a fourteenth amendment *Swain*-based challenge, O'Neal argues that his sixth amendment rights were violated based on the standards announced in *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985), *vacated sub nom. Michigan v. Booker*, 478 U.S. 1001, *reinstated*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987).

O'Neal's argument cannot be accepted, because the Supreme Court has now determined that the sixth amendment does not prohibit a prosecutor from eliminating prospective jurors on the basis of race. *See Holland v. Illinois*, 493 U.S. 474, 477-87 (1990). To avoid this ruling, O'Neal argues that *Holland* established a "new" rule of constitutional law and, as a result, it cannot be applied retroactively to bar his sixth amendment claim. (Doc. 49, pp. 12-13) (citing *Teague v. Lane*, 489 U.S. 288 (1989)).

Although he correctly states that a new rule of federal constitutional law does not apply retroactively to cases on collateral review unless it fits one of the *Teague* exceptions, 489 U.S. at 310, this principle does not apply to *Holland*. When the Supreme Court determines, as in *Holland*, that a particular constitutional amendment does not contain a right that might be favorable to convicted defendants, the ruling does not implicate the concerns underlying retroactivity. These concerns focus on the deleterious effects that retroactive application of new rules of constitutional law have on the states, such as forcing states to justify the legality of a convicted defendant's confinement in light of newly evolved constitutional commands, depriving states of the opportunity to finalize criminal proceedings, and undermining the goal of deterring criminal activity. 489 U.S. at 309-10. None of these concerns apply to *Holland*, because convicted defendants cannot benefit from its holding. Consequently, defendants will not seek to collaterally challenge their convictions based on *Holland* and states will not suffer the costs of fending off such challenges.

O'Neal argues that he is entitled to benefit from the holding of *Booker* that the sixth amendment protects against racially discriminatory jury selection, 775 F.2d at 770-71, because *Booker* was in effect in the Sixth Circuit, and therefore "binding on . . . the State of Ohio" during O'Neal's direct state appeals. (Doc. 31, p. 19). O'Neal further argues, "Booker is still the law for the Sixth Circuit." O'Neal also argues that there exists an inequity in denial of retroactivity which prevents him from raising a fourteenth amendment *Batson* claim, while applying retroactivity to the *Holland* decision. *Id.* These contentions

lack merit, because the Supreme Court held that the sixth amendment has never prevented a prosecutor from exercising peremptory challenges in a racially discriminatory manner. *See Holland*, 493 U.S. at 478. The sixth amendment right to raise a claim of race-based exclusion in jury selection did not die in *Holland*, it simply never existed. *Booker*, therefore, according to the Supreme Court, is implicitly an incorrect decision. *See Holland*, 493 U.S. at 478.

The aforementioned conclusion is reached with reluctance, because we do not personally agree with the *Holland* decision. The undersigned has, in a previous case, ruled the sixth amendment prohibits discriminatory jury selection. *See, e.g., Bell v. Morris*, No. C-1-86-1241, Report and Recommendation (S.D. Ohio June 29, 1989).

Nevertheless, we believe the *Holland* ruling requires the result reached in this case. However, the District Judge should be aware that a contrary analysis has been made by District Judge Spiegel in *Bell v. Morris*, C-1-86-1241 (S.D. Ohio Jan. 8, 1991). Judge Spiegal ruled that the *Holland* decision was not dictated by existing precedent and, therefore, represented a new rule of law that should not be applied retroactively. That decision is presently pending on appeal.

O'Neal's allegations of racially discriminatory jury selection are quite serious. He relies, in part, on the prosecutor's remarkable explanation for exercising his sixth peremptory challenge to exclude a black woman from the petit jury: "she was very defense-minded . . . and the fact that she has already testified for a defendant, and also *on the basis of race.*" (Tr. 1496-97)

(emphasis added); *see also Ohio v. Podborny*, 41 Ohio App. 3d 135, 138 (Wiest, J., dissenting). The trial judge then informed the prosecutor that Ohio law provided him an unlimited right to exercise peremptory challenges. (Tr. 1497-98).

Since the Supreme Court has held the sixth amendment does not support O'Neal's challenge to discriminatory jury selection, and since *Batson* does not apply retroactively to O'Neal's conviction, he must rely on the fourteenth amendment as a basis for his claim. *Supra*, p. 10. O'Neal, however, has not attempted to establish a prima facie case of racial discrimination based on the standards of *Swain*. *See* Doc. 31, pp. 9-21.

Accordingly, O'Neal's second claim cannot be recognized as a separate ground for granting a habeas corpus writ.

III. The Trial Court Did Not Violate O'Neal's Rights Under the Confrontation and Compulsory Process Clauses of the Sixth Amendment

O'Neal claims that the trial court violated his rights under the Confrontation Clause of the sixth amendment by limiting his crossexamination of Special Agent Fredrick Graessle of the Federal Bureau of Investigation (FBI).

Graessle was subpoenaed as a witness by co-defendant Dimple Podborny to testify about McLean's role as an FBI informant. Graessle responded to a limited number of questions on direct examination, which previously had been submitted to and approved by the United

States Justice Department in accordance with procedures set forth in 28 C.F.R. § 16.21, *et seq.*, regarding the disclosure of any information acquired by an employee of the Department of Justice in the performance of his official duties.[4]

On direct examination, Graessle testified that he was a special agent with the FBI in Cleveland, Ohio and that on March 10, 1981, McLean had asked him about the possibility of obtaining immunity from federal prosecution in return for "turning State's evidence." (Tr. 5081-82). Graessle said that he told McLean that he did not have the power to promise anything "on those lines," but did advise McLean that an Assistant United States Attorney, who was able to make promises regarding prosecution, "was very interested in obtaining McLean's cooperation regarding this matter." (Tr. 5082). When McLean asked Graessle whether there were other federal charges pending against him, Graessle told McLean that he knew of no other federal charges at that time, but that there were

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[4] These federal regulations prohibit Justice Department employees from disclosing such information without prior departmental approval. The regulations further provide:

> If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceedings, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

28 C.F.R. § 16.22(a), (c).

other crimes which had been uncovered as a result of the FBI's investigation with which McLean might be charged. *Id.* Graessle further testified that McLean said he might have information that could identify Podborny's killer, as well as when, where, and how Podborny may have been killed. (Tr. 5082-83).

O'Neal's counsel sought to pose additional questions to Graessle on cross-examination, because Graessle had been present when O'Neal made certain incriminating statements to the Cleveland Police on March 26, 1981, and, according to O'Neal, was an "active participant in the gathering of evidence and prosecution of this case." (Doc. 31, p. 38; Tr. 203-17). O'Neal's counsel asked Graessle if he had been involved in the FBI investigation when Podborny's body was found and whether he could tell who provided the information "as to where that body was." (Tr. 5083-84). Graessle refused to answer these questions, stating "I'm not authorized by the Department of Justice to answer that." (Tr. 5084).

The trial court sustained objections to O'Neal's line of questioning after an Assistant United States Attorney explained at side bar that Graessle could not answer questions which had not been previously approved in accordance with federal regulations. (Tr. 5088). The court explained to the jury that "no employee of the Department of Justice may testify without prior authorization . . . as to the questions he is going to be asked." (Tr. 5090-91). After the court sustained an objection to another question about Graessle's involvement in the presentation of the case, O'Neal's counsel said he would sit down without asking any further questions even though he had

"a lot of other questions [he] would like to ask." (Tr. 5091).

On O'Neal's direct appeal, the Ohio Court of Appeals made the following findings of fact, which are entitled to the presumption of correctness:[5]

> [O'Neal] could have but did not subpoena the FBI Agent. [He] could have but did not submit the required application to the Justice Department. [He] could have but did not request a continuance of the trial so that he could pursue the application requirement.

(Doc. 10, Ex. C, p. 8).

O'Neal argues that he should have been allowed to cross-examine Graessle about (1) the circumstances surrounding O'Neal's statements to the police to show the statements were unreliable; (2) the identity of the informant who found Podborny's body and notified the FBI of this fact to discredit the testimony of Wilbur Higgins, who testified that he notified a city inspector of the location of Podborny's body after O'Neal told him where it was; and (3) payments made to McLean for his testimony and by the FBI for his role as an informant in other cases to undermine McLean's credibility with the jury. (Doc. 49, pp. 24-25).

The Confrontation Clause of the sixth amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him."

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[5] *See* 28 U.S.C. § 2254(d); *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 455 U.S. 591, 597-98 (1982); *Nichols v. Perini*, 818 F.2d 554, 557-58 (6th Cir. 1987).

One of the main purposes of the right of confrontation is to ensure a defendant's right to impeach and otherwise challenge adverse testimony by way of cross-examination. *See, e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Stevens v. Bordenkircher*, 746 F.2d 342, 346 (6th Cir. 1984). However, the right of confrontation does not include the right to cross-examine witnesses who have provided favorable testimony. *See United States v. Kindig*, 854 F.2d 703, 708 (5th Cir. 1988); *United States v. Crockett*, 813 F.2d 1310, 1313-14 (4th Cir.), *cert. denied*, 484 U.S. 834 (1987); *United States v. Andrews*, 765 F.2d 1491, 1501 (11th Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986). In determining whether or not a witness has provided adverse testimony implicating a defendant's rights under the Confrontation Clause, the Court must assess the actual content of the witness's testimony, not whether he was called by the prosecution or on behalf of a co-defendant. *United States v. Crockett*, 813 F.2d at 1314; *see also United States v. Kindig*, 754 F.2d at 708-09.

In this case, Graessle was not called as a witness by the prosecution, but by a co-defendant. He did not provide any testimony that could have adversely affected O'Neal's defense. Indeed, the testimony was favorable to O'Neal because it suggested that McLean had a self-interest motive in testifying for the prosecution. In posing additional questions to Graessle, O'Neal's attorney was attempting to elicit further favorable testimony, rather than impeach Graessle or to challenge the testimony he had given on direct examination. O'Neal's rights under the Confrontation Clause were therefore not implicated by the trial court's limitation of the cross-examination of

Graessle to only those areas covered by the authorization granted co-defendant Dimple Podborny.

The right to elicit favorable testimony is encompassed by the sixth amendment right of a defendant "to have compulsory process for obtaining witnesses in his favor." *United States v. Crockett*, 813 F.2d at 1313. The Compulsory Process Clause of the sixth amendment guarantees the criminal defendant's fundamental right to present witnesses in his own defense. *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). The right to offer the testimony of witnesses and to compel their attendance, if necessary, is included in the right to present a defense, which is "a fundamental element of due process of law." *Id.* at 409, quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967). However, although the right of the defendant to present evidence stands on the same footing as other sixth amendment rights, there is a significant difference between the right to compulsory process and other sixth amendment rights, because the availability of the right to compulsory process "is dependent entirely on the defendant's initiative." *Id.* at 410. The decision whether to employ the right to compel the presence and present the testimony of witnesses rests solely with the defendant, and the "very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct." *Id.* In the exercise of the right to present witnesses, the defendant must comply, like the prosecution, with established rules of procedure and evidence to assure both fairness and reliability in the trial proceedings. *Id.* at 411 and n.15.

In the instant case, O'Neal's counsel had the opportunity to demand the testimony of Graessle in accordance

with the procedures set forth in 28 C.F.R. § 16.21, *et seq.*, but did not do so. Because he failed to exercise his right to compel the presence and present the testimony of Graessle, O'Neal cannot now claim that right was violated. *Cf. United States v. Marino*, 658 F.2d 1120, 1125 (6th Cir. 1981). Furthermore, defense counsel developed much of the same information O'Neal sought from Graessle during the cross-examination of police officers Timothy Patton and Jerry Hruby. (Tr. 3557-58, 4523-31, 4541-42).

Accordingly, O'Neal's claim that the trial court violated his rights under the Confrontation Clause or Compulsory Process Clause of the sixth amendment lacks merit.

IV. The Jury Instructions Regarding Intent Violated O'Neal's Right to Due Process of Law

O'Neal raises two arguments challenging the jury instructions given at trial. First, he argues that the trial court deprived him of a fair trial by giving extensive instructions on conspiracy which forced O'Neal to defend against a conspiracy charge not contained in the indictment. (Doc. 31, pp. 28-30). Second, O'Neal contends that the jury instructions deprived him of his rights under the fourteenth amendment Due Process Clause by relieving the State of its burden of proving beyond a reasonable doubt the intent element for each offense charged. (Doc. 31, pp. 22-26; Doc. 49, pp. 14-15; Doc. 65). According to O'Neal, this occurred when the trial court spoke of intent in terms of "the defendants or co-conspirators or aiders and abettors" as a group, which created the "automatic presumption that if any of the aider and abettors, co-

defendants, or co-conspirators possessed the culpable mental state," it could be imputed to all others. (Doc. 49, p. 16). The instructions at issue are set forth verbatim in Appendix A, attached hereto.

A. The Conspiracy Instructions, In and Of Themselves, Did Not Violate O'Neal's Right To Due Process

Under the Due Process Clause of the fourteenth amendment, the charging method employed by a state must give the criminal defendant fair notice of the charges against him so that he may adequately prepare a defense. *See Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *see also Olsen v. McFaul*, 843 F.2d 918, 930 (6th Cir. 1988); *Koontz v. Glossa*, 731 F.2d 365, 369 (6th Cir. 1984); *Watson v. Jago*, 558 F.2d 330, 338-39 (6th Cir. 1977). It is a well established principle of procedural due process that notice of the specific charge, and an opportunity to be heard in a trial of the issues raised by that charge, are among the constitutional rights of every accused in both state and federal criminal proceedings. *Cole*, 333 U.S. at 201; *In re Oliver*, 333 U.S. 257, 273 (1948). *See generally Hovey v. Elliot*, 167 U.S. 409, 414-18 (1897).

In this case, the indictment provided O'Neal with fair notice of the charges against him. The indictment charged O'Neal with aggravated murder, aggravated robbery and kidnapping, and the trial court properly instructed the jury that those were the three counts before it. (Tr. 6157). The court restated the charges against O'Neal at the end of its instructions and discussed the elements of "conspiracy" and "aiding and abetting" solely for the purpose of

determining complicity. (Tr. 6177-93). Indeed, the trial judge specifically pointed out when instructing on the elements of "conspiracy" and "aiding and abetting" that the defendants had not been charged with any offense under the Ohio conspiracy statute. (Tr. 6177-78). *Contrast Koontz v. Glossa*, 731 F.2d at 369-70.

In Ohio, a defendant can be charged with complicity either in terms of the principal offense or as an aider and abettor or co-conspirator in the commission of the principal offense. Ohio Rev. Code Ann. § 2923.03(A),(F) (Anderson 1987) (effective Jan. 1, 1974). *See Hill v. Perini*, 788 F.2d 406, 407 (6th Cir.), *cert. denied*, 479 U.S. 934 (1986). "This practice has apparently been established in Ohio for over 100 years." *Id.*, citing *Hanoff v. State*, 37 Ohio St. 178 (1881). This practice, which permits jury instructions on complicity even though the defendant has been charged and tried as a principal, does not deprive the defendant of due process of law. *Id.* at 407-08. Because the practice was settled law in Ohio at the time of O'Neal's trial, O'Neal had notice of the possibility that the judge might instruct the jury regarding aiding and abetting and conspiracy for the purpose of determining complicity. *Id.*

B. The Jury Instructions On The Intent Element Of Each Offense Violated O'Neal's Right To Due Process

The Due Process Clause of the fourteenth amendment requires a state to prove beyond a reasonable doubt every fact necessary to constitute the charged offense. *In re Winship*, 397 U.S. 358, 364 (1970). The reasonable doubt standard applies to each element of a criminal offense to

minimize the possibility of any fact-finding errors in an attempt to ensure that a state incarcerates only the guilty. *See id.* at 363-65. The trial court may not instruct a jury in a manner that shifts to a defendant the burden of proving a critical fact in dispute, not only because this violates a defendant's right to the presumption of innocence, but also because it increases the likelihood of an erroneous conviction. *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975). Where intent is an element of the charged offense, the court may not instruct a jury that the existence of certain facts automatically establishes the element of intent. *Sandstrom v. Montana*, 442 U.S. 510, 521-23 (1952). A jury instruction that creates such a mandatory presumption offends the Due Process Clause because it relieves the State of its burden of proof on an essential element of the charged offense. *Id.*

This case does not involve the use of a mandatory presumption, because the jury was never instructed that it must infer that the defendant had a purpose to commit the charged offenses based on other facts in evidence. *Cf. Clark v. Jago*, 676 F.2d 1099, 1104 (6th Cir. 1982), *cert. denied*, 466 U.S. 977 (1984). However, the principles set forth in *Sandstrom* and *Mullaney* are applicable, because the primary due process concern in those cases was whether the challenged practice had the effect of relieving the State of the burden of proof on an element of the crime charged. *Id.; see also Sandstrom*, 442 U.S. at 521-24; *Mullaney*, 421 U.S. at 699-701. If the challenged instruction is found to have had such an effect, the error will constitute a due process violation unless the instructions as a whole would have prevented a reasonable juror from

assuming that the State did not have to prove the defendant's independent intent to commit the crimes charged. *See Francis v. Franklin*, 471 U.S. 307, 314-15 (1985).

In order to determine whether the challenged instructions relieved the State of the burden of proof on the issue of O'Neal's state of mind, it is necessary to examine what is required to establish intent under Ohio's complicity statute. *Cf. Flowers v. Blackburn*, 779 F.2d 1115, 1120 (5th Cir.), *cert. denied*, 475 U.S. 1132 (1986). The statute provides in pertinent part:

> (A) No person, *acting with the kind of culpability required for the commission of an offense*, shall do any of the following:
>
> * * *
>
> (2) Aid or abet another in committing the offense;
>
> (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code[.]

Ohio Rev. Code Ann. § 2923.03 (Anderson 1987) (emphasis added).

Under this statute, aiders and abettors and co-conspirators must have the culpable mental state required for the commission of the principal offense. *State v. Lockett*, 49 Ohio St. 2d 48, 60 (1976), *rev'd on other grounds*, 438 U.S. 586 (1978). The Ohio Supreme Court has held, in the context of the crime of aggravated murder, that a defendant cannot be convicted solely because he engaged in a felony that resulted in a murder; rather, the prosecution must always prove intent to kill, including cases where it proceeds on a complicity theory. *State v. Scott*, 61 Ohio St.

2d 155, 166 (1980); *see also Clark v. Jago*, 676 F.2d at 1104. A jury may properly infer an aider and abettor's intent to kill where the facts show that the participants in a felony entered into a common design and the aider and abettor knew either that an inherently dangerous instrumentality was to be employed to accomplish the felony or that the felony and the manner of its accomplishment would be reasonably likely to produce death. *Scott*, 61 Ohio St. 2d at 165; *see also Lockett*, 49 Ohio St. 2d at 59-60. Therefore, the State in the instant case could attempt to prove O'Neal's intent to kill either by producing direct evidence of intent or by producing evidence to support a *Lockett/Scott* inference.

A jury instruction on intent to kill, based on the state of mind of "defendant and/or his accomplice," relieves the prosecution of its burden of proving an aider and abettor's independent intent to kill as required under Ohio law. In that circumstance, the instruction can be interpreted by a reasonable juror to mean that the defendant personally did not have to have the intent to kill in order to be convicted. The jury may believe that the accomplice's intent is sufficient to convict the defendant for aggravated murder. *Clark v. Jago*, 676 F.2d at 1105; *Bell v. Morris*, 923 F.2d 854 (6th Cir. Jan. 24, 1991) (unpublished, available on Westlaw), *cert. denied*, 111 S. Ct. 2262 (1991). Here, the trial court did not go so far as to specifically state that O'Neal's intent to commit the crimes charged could be inferred from the state of mind of any other defendant, co-conspirator or accomplice. However, in instructing the jury on the elements of the offenses, the court discussed intent generally in terms of the state of mind of the "defendants, co-conspirators, or

aiders and abettors" without reference to the intent required of each defendant individually. (*See* App. A, pp. 2, 3, 5-6, 7-8). These instructions were confusing, because they failed to set forth the requirement that each defendant have the intent to commit the offenses charged in order to be found guilty. Without further explanation, a reasonable juror could have interpreted these instructions to mean that a finding of intent on the part of one co-conspirator would be sufficient to establish the intent of others participating in the alleged conspiracy.

These errors in the jury instructions constitute a due process violation unless the instructions as a whole explained the confusing language so that a reasonable juror could not have concluded that the intent of one co-conspirator could be imputed to others. *See Francis v. Franklin*, 471 U.S. at 315; *Clark v. Jago*, 676 F.2d at 1105-06.

When instructing on the intent element of the crime of aggravated murder, the court stated:

> Wherein the evidence may disclose the existence of complicity by way of an aider and abettor or a conspiracy, the law of the state of Ohio is as follows: . . . where you have an unlawful act contemplated in the original conspiracy, although not identical with or similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was performed was reasonable [sic] or likely to produce the death of another, then each conspirator, or aider and abettor is equally guilty as the principal offender of the homicide.

(App. A, p. 2). This instruction was repeated to the jury when it requested a "brief definition of aggravated murder" during its deliberations. (Tr. 6208). Although the instruction was stated in pro-prosecution terms of a finding of guilt, it appears to set forth one of the two appropriate methods of inferring an accomplice's or co-conspirator's intent to kill under *Lockett* and *Scott*.

The trial judge also instructed the jury to "separately consider the elements applicable to each one of the defendants as [if] he or she were separately tried" and to "consider your finding as to each defendant uninfluenced by your verdict as to the other defendant." (App. A, pp. 3, 16). Further, when giving its instructions on complicity and conspiracy, the court told the jury that the State had to prove beyond a reasonable doubt the existence of a conspiracy or complicity among the defendants and the other co-conspirators before it could render a guilty verdict on the main charges. (App. A, pp. 7, 12, 13-14, 15). *Contrast Bell v. Morris*, 923 F.2d 854, at *13-14 (6th Cir. Jan. 24, 1991) (unpublished, available on Westlaw), *cert. denied*, 111 S. Ct. 2262 (1991).

On the other hand, no instructions were given regarding the requisite intent of an accomplice or co-conspirator on the charges of aggravated robbery or kidnapping. Nor did the court ever explicitly instruct the jury, with respect to any of the three offenses charged, that the State had to prove an accomplice's or co-conspirator's independent intent to commit the crimes. When instructing on the elements of complicity, the court stated: "[W]here two or more persons have a common purpose to commit a crime and wherein a continuing sequence over [sic] events other crimes are committed, all

of the persons are responsible for all of the crimes that happen in the continuous sequence of the events even though all of said persons were not physically present when the other crimes were committed." (App. A, pp. 11-12). Given that the court repeatedly lumped "defendants, co-conspirators, and aiders and abettors" together throughout its instructions, without clarifying that an independent purpose to commit the crimes was necessary for a conviction, this instruction could have been interpreted by a reasonable juror to mean that an accomplice could be convicted for crimes only the principal offender intended to commit during the sequence of events.

The risk that the jury could have wrongly interpreted the instructions on intent was substantially increased by the prosecutor's closing remarks:

> MR. MARINO: Now, I fear that defense counsel gave you the impression that each defendant must commit every element of the crime to be liable (sic). That's incorrect."

(Tr. 6075). The judge overruled an objection to this statement, thus appearing to endorse it. *Id.* The prosecutor continued:

> MR. MARINO: In the state of Ohio and in most states in my opinion we have what's called conspiracy and the judge is going to tell you about that. The State is bound to prove to a jury two things. First, that the crimes alleged have been committed. And at this point, is there any doubt in your mind that the man was kidnapped, he was robbed, he was bludgeoned and shot to death. The next thing we're bound to prove to you is that those accused of the crime participated in a criminal conduct and engaged in a

course of criminal conduct which eventually led to the commission of those crimes.

MR. MILANO: Objection. It is a misstatement of the law, sir.

THE COURT: Overruled.

MR. MARINO: Folks, if that's a misstatement of the law, you are the second jury to hear it (referring to the trial of the codefendants).

MR. COUGHLIN: Objection, your Honor.

THE COURT: Overruled. I would indicate the first case will not be mentioned in this closing argument.

(Tr. 6075-76). By making the aforementioned rulings, the trial judge endorsed the prosecutor's misstatement of law and confirmed to the jury that a similar instruction had been given in the trial of the codefendants. The prosecutor's remarks were likely to have been accepted by the jury as the law, because they came from a state official charged with prosecuting criminal cases and were essentially endorsed by the trial judge. The jury was left with the impression that the State did not have to prove beyond a reasonable doubt an independent intent to commit each crime so long as it proved that each defendant was in some way involved in a conspiracy that eventually led to kidnapping, robbery, and murder.

In the context of the instructions as a whole, viewed in light of the prosecutor's remarks in his closing argument, which were endorsed by the trial court's refusal to sustain an objection, the remaining instructions were insufficient to dispel the possibility of confusion. A reasonable juror could have concluded that the intent of one

co-conspirator could be imputed to other participants in the alleged conspiracy. Thus, these erroneous instructions constituted a violation of O'Neal's right to due process of law.

However, this does not end the inquiry. We must next determine whether this due process violation amounted to harmless error. *See Clark v. Jago*, 676 F.2d at 1105. Because this determination involves examination of the entire trial, we will make this analysis after review of other alleged errors. *See infra*, pp. 41-49.

V. The Additional Alleged Trial Errors of Nonconstitutional Dimension Were Sufficiently Prejudicial to Implicate O'Neal's Fair Trial Rights

O'Neal argues that he was deprived of his fourteenth amendment Due Process right to a fundamentally fair trial because the trial court erroneously admitted into evidence gruesome photographs of the murder victim, as well as other inflammatory physical evidence, and because the prosecutor committed acts of prejudicial misconduct during trial. (Doc. 31, pp. 30-36, 38-43).

The scope of federal habeas review of these claims is narrow. Where, as here, no specific constitutional guarantee is involved, these claims of ordinary trial error do not rise to a constitutional level unless the errors were so prejudicial as to deprive a defendant of a fair trial. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 642-43 (1974); *Martin v. Foltz*, 773 F.2d 711, 716 (6th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986). *See also Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988).

A. The Admission of Certain Evidence Prejudiced O'Neal

O'Neal challenges the admission into evidence of eighteen photographs of the murder victim taken at the coroner's office, showing the victim from different angles in various stages of undress, and eight close-ups of the victim's face. (*See* Tr. 3710-13). O'Neal also challenges the admission of nine photographs showing the victim in the field where he was discovered; the actual "smelly" clothing and wrappings in which the victim was discovered; a jar containing the skin from the victim's left finger; a box containing scalp hair from the victim; and a crowbar found in O'Neal's bar. (*See* Tr. 3631, 4754, 4766, 4791, 4814).

In his assignments of error to the Ohio Court of Appeals, O'Neal argued only that the admission of photographs was prejudicial. (Doc. 49, A-164, II). Ordinarily, this would mean that O'Neal waived any claim on federal habeas review regarding the admission of the allegedly inflammatory physical evidence absent a showing of "cause" for and "prejudice" from his failure to raise this claim to the state appeals court. *See Ewing v. McMackin*, 799 F.2d 1143, 1148 (6th Cir. 1986); *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). However, the Ohio Court of Appeals *sua sponte* addressed whether the admission of Podborny's clothing, the skin from Podborny's finger and the crowbar unfairly prejudiced O'Neal. The only evidentiary issue the Court of Appeals did not address was the admission of the scalp hair. O'Neal has not presented any justification for his failure to raise that issue to the state appeals court, and this Court should therefore consider

that claim waived. However, since the Ohio Court of Appeals addressed the remainder of O'Neal's claims regarding the introduction of inflammatory physical evidence, this Court should consider those issues on the merits.

In determining whether the admission of the evidence was prejudicial to O'Neal, this Court must accord a presumption of correctness to the state court's findings of fact that are fairly supported by the record. *See* 28 U.S.C. § 2254(d); *see also Sumner v. Mata*, 455 U.S. 591, 597-98 (1982). This presumption of correctness does not attach to the state court's conclusions of law, or to its application of law to the facts. *Pryor v. Rose*, 724 F.2d 525, 528 (6th Cir. 1984) (en banc).

The Ohio Court of Appeals ruled on O'Neal's claim as follows:

> [The coroner's] photographs of the decomposed remains of the decedent, are relevant and contribute to proof that the decedent had been dead for a prolonged period of time before his body was found. The piece of finger skin, removed from the decomposed remains, was used to establish the identification of the decedent. In the chain of evidence, the identifying finger skin was relevant to the decomposed remains. The decomposed remains were relevant to proof that the body had lain for a long time in a secret place. Perhaps the number of photographs (18 of the decomposed remains) was somewhat excessive, but we consider the importance of its relevancy to far-out way [sic] the danger of unfair prejudice or confusion. We reach the same conclusion as to the introduction of the decedent's clothing. As an additional point, we find that

> amongst this clothing there was also introduced some other articles which were strongly relevant and indicative of an attempt to hide the body and we find that this is relevant to the case and not abusive. Over objection, the State also introduced a crow bar which was found in a bar owned and operated by . . . O'Neal. We can find no relevancy amongst the evidence which would connect this crow bar with this case. . . . We . . . conclude that the admission of this crow bar was erroneous. However, we do not conclude that, in view of all of the other evidence in the trial, that the admission of this exhibit was so prejudicial as to justify a reversal.

(Doc. 10, Ex. C, pp. 6-7).

Ohio R. Evid. 403(A) generally provides that "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice." The risk of unfair prejudice occurs when the evidence is so gruesome or is "charged with such immediacy or emotional impact" as to produce an inflammatory reaction by the jury against the defendant. *State v. Benner,* 40 Ohio St. 3d 301, 311 n.2, 533 N.E.2d 701 (1988), *cert. denied,* 110 S.Ct. 1834 (1990); *State v. Tingler,* 31 Ohio St. 2d 100, 285 N.E.2d 710, 713 (1972); *State v. Hill,* 12 Ohio St. 2d 88, 90, 232 N.E.2d 394 (1967). The mere fact that the evidence is gruesome or horrendous is not sufficient to render it per se inadmissible. *State v. DePew,* 38 Ohio St. 3d 275, 281, 528 N.E.2d 542 (1988), *cert. denied,* 489 U.S. 1042 (1989). Rather, the risk of prejudice created by the introduction of such evidence must be balanced against the need for the evidence to prove an issue at trial. *See Papp v. Jago,* 656 F.2d 221, 223

(6th Cir.), *cert. denied,* 454 U.S. 1035 (1981); *see also State v. Martin,* 19 Ohio St. 3d 122, 129, 483 N.E.2d 1157 (1985) (per curiam), *cert. denied,* 474 U.S. 1073 (1986), quoting *State v. Maurer,* 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984), *cert. denied,* 472 U.S. 1012 (1985).

Under Ohio law, an additional element is involved in the balancing process when gruesome photographs are introduced in a capital prosecution. Such evidence is admissible only if "the probative value does not, in a simple balancing of the relative values, outweigh the danger of prejudice to the defendant" and the photographs are not repetitive or cumulative in nature. *State v. Morales,* 32 Ohio St. 3d 252, 513 N.E.2d 267, 273-74 (1987). The Ohio Supreme Court has noted that this standard, which is stricter than the usual standard for the admission of evidence, "is justified in capital cases because gruesome photographs which depict the victim of the offense are charged with such immediacy and emotional impact that the risk of prejudice is enhanced proportionately, a risk that we are less willing to tolerate in a case where the defendant faces a penalty of death." *State v. Benner,* 40 Ohio St. 3d at 311 n.2.

We have studied the eighteen photographs taken at the coroner's office (St. Exs. 1 through 1-Q). All of these photographs are gruesome. They graphically depict the deterioration to the victim's body and the injuries to the skull area, as well as the victim's distorted facial features, which were discolored by the wrappings encasing the body. The photographs of the victim's head (St. Exs. 1 through 1-G) are especially gruesome. *Cf. State v. Rowe,* 163 W. Va. 593, 259 S.E.2d 26, 28 (1979). They constitute relevant evidence of cause of death, intent to kill, and the

fact that the victim had been dead for a long period of time. The remaining ten pictures of the victim's body, which were taken as the wrappings and clothing were removed, are of possible relevance to prove efforts made to hide the body. The coroner and other witnesses, however, provided uncontradicted testimony at trial on all of these issues. (Tr. 3707-15). Furthermore, the defense did not contest either the cause of death, the intentional killing, or the efforts to hide the body. Thus, despite their relevancy, the risk of prejudice far outweighed the probative value, because there was no need to admit these photographs. Therefore, the admission of State's Exhibits 1 through 1-Q constituted prejudicial error.

As to the nine photographs introduced at trial showing the location where the victim's body was discovered, respondent submitted only seven to this Court for review.[6] The record indicates that six of the photographs depicted the area where the body was discovered, showing only the body encased in wrappings, and the remaining three photographs depicted the body at the discovery site as it was unwrapped. (Tr. 4491-92). We have carefully studied the seven photographs submitted, and we find they are consistent with the record description. These photographs constitute relevant evidence of the attempt to hide the body and the condition of the body when it was found. The six photographs depicting the area where

[6] Respondent admits that these photographs may not be the same photographs introduced in O'Neal's trial, but that they were the only photographs that could be found depicting the location of Podborny's body. (Doc. 67).

the body was discovered and the body encased in wrappings (St. Exs. 58, 58A, 58B, 58C, 58D, 58F) are not inflammatory. *Cf. State v. DePew*, 38 Ohio St. 3d at 281. Moreover, one of the three photographs submitted depicting the body as it was unwrapped at the scene (St. Ex. 58E) is not gruesome, because body parts are not recognizable in it. The remaining two photographs, which are close-up views of the victim's upper body and face, are gruesome enough to create a risk of prejudice. (St. Exs. 58G, 58H). The coroner and other witnesses provided uncontradicted evidence to establish the same facts these photographs were offered to prove. The defense did not contest the facts that the body was hidden and had deteriorated. Thus, despite their relevancy, the risk of prejudice far outweighed the probative value, because there was no need to admit these photographs. Therefore, the admission of State's Exhibits 58-G and 58-H constituted prejudicial erorr.

The admission of the jar containing the skin from the victim's left finger was prejudicial to O'Neal. We agree with the Ohio Appeals Court's finding that the skin was relevant to fingerprint identification of the decomposed remains as Mr. Podborny. However, the fingerprint taken from the skin, which was used to establish identity, was already in evidence. Furthermore, the identity of the victim was not contested by the defense. (Tr. 5714). Thus, although it was proper to preserve the victim's skin in the event the defense questioned the fingerprint identification, there was no need to admit the body part into evidence. The introduction of a part of the victim's body was charged with such emotional impact that it could only have constituted an appeal to the jury's passion. The

risk of prejudice far outweighed the probative value of the evidence because there was no need for this evidence. Therefore, the admission of the victim's skin constituted prejudicial error.

The admission of a "crowbar" found in O'Neal's saloon when Allen was arrested there around 12:00 a.m. on March 26, 1981 was also prejudicial to O'Neal. (Tr. 4439-40). The Ohio Court of Appeals found it was not relevant because there was no evidence connecting the crowbar with the murder. The crowbar was tested for the presence of blood, and the test results were negative. (Tr. 3702). Thus, the admission of the crowbar constituted prejudicial error.

Finally, the admission of the victim's malodorous bloodstained clothes was well as the wrappings that encased the victim's body was prejudicial to O'Neal. The Ohio Appeals Court concluded that the evidence had probative value because it tended to show that the body had lain for a long time before it was discovered and that attempts had been made to hide the body. However, there was other substantial uncontested evidence in the record to establish these facts, including photographs of the identical clothing and wrappings. (Tr. 4752-53). Thus, there was no need at all for the admission of this evidence. The admission of the victim's clothing and wrappings was highly inflammatory because the evidence was charged with an emotional immediacy. For these reasons, the admission of the said evidence constituted prejudicial error.

The aforementioned prejudicial errors are sufficient to trigger further inquiry as to whether O'Neal was deprived of a fundamentally fair trial.

B. The Prosecutor's Misconduct Prejudiced O'Neal

1. The Prosecutor Improperly Questioned O'Neal About a Previous Killing

O'Neal contends that the prosecutor improperly cross-examined him by eliciting details of a previous incident in which O'Neal shot and killed another person. O'Neal argues that the cross-examination elicited impermissible "other acts" evidence in violation of Ohio R. Evid. 404(B) and in violation of a court order prohibiting reference to the incident.

O'Neal's assignment of error to the Ohio Appeals Court regarding this issue claimed trial court error rather than prosecutorial misconduct. (Doc. 49, App. A-164, IV). The Ohio Court of Appeals, however, addressed the issue and made the following factual findings regarding this claim, which are entitled to the presumption of correctness. *See* 28 U.S.C. § 2254(d).

> [D]uring the examination of a police officer, the prosecutor asked the court to direct all parties to refrain from asking why [O'Neal's] gun had been initially confiscated by the East Cleveland Police Department. The court ordered all parties not to examine witnesses concerning why [O'Neal's] gun had been confiscated. The jury was to know only that it was returned to him on January 6, 1981.

> [O'Neal's] gun had initially been confiscated because he was involved in a homicide. As a result of that investigation, he was charged with voluntary manslaughter, but the charge was eventually dismissed. During cross-examination, in spite of its previous order, the court permitted the prosecutor to extensively cross-examine [O'Neal] about the details surrounding the manslaughter case. . . .

(Doc. 10, ex. C, p.4). This is a clear indication of prosecutorial misconduct. Furthermore, since we have already identified prejudicial trial errors, we are required to examine the entire trial for fairness. *See Arizona v. Fulminante*, 111 S. Ct. 1246, 1263-64 (1991).

On direct examination, O'Neal attempted to explain why he received $6,500 from Toney and what he did with it. He stated the money was originally intended to be Toney's investment in his business and was to be used to purchase a liquor license. However, the license cost more than that, so he held the money for other purposes. Subsequently, he was charged with a crime in East Cleveland, the nature of which he did not describe, and he used the $6,500 to pay attorney fees in that case. The case was dismissed, and he was able to retrieve a .38 caliber revolver that had been confiscated in connection with the case. He emphasized that the revolver was registered, and stated it would not have been returned otherwise. (Tr. 4844-46). His attorney then asked the following question and received the following answer:

> Q: You certainly wouldn't go out and kill someone with your registered gun, would you?
>
> A: I wouldn't do that.

(Tr. 4846-47). During direct examination, O'Neal did not mention the facts of the East Cleveland case except to say that he was "charged with something." (Tr. 4845).

Co-defendant Allen's attorney then elicited further testimony from O'Neal on the East Cleveland incident without mentioning that a shooting had occurred. O'Neal testified that a shell was fired from his revolver when it was confiscated in East Cleveland and that authorities had a sample of the bullet. (Tr. 4874, 4876). O'Neal testified further that there had been no testimony that the the [sic] bullets from his revolver had been compared to the bullet in evidence. (Tr. 4876).

On cross-examination, over numerous objections by O'Neal's counsel, the prosecutor asked the following questions, clearly implying that because O'Neal had killed Calvin Heinz in East Cleveland by shooting him in the head, he had done the same thing to Mr. Podborny.

> Q. You shot that pellet into Calvin Heinz' head, the same way you shot Henry Podborny in the head?
>
> * * *
>
> A. No, I didn't shoot Calvin's head like that.
>
> Q. But you did shoot Calvin Heinz in the head, didn't you?
>
> * * *
>
> A. No, I didn't shoot him in the head, it was an accident.

(Tr. 4908). During this exchange, O'Neal's counsel objected to each question, but the judge did not rule on the objections. *Id.*

Q. You shot him in the head; is that correct?

A. I had 50 witnesses brought in to say that it was on the record that they saw him when he was trying to kill me.

Q. The only witnesses were two lady friends?

Id. The Judge overruled an objection to these questions. *Id.*

Q. You attempted to mislead the jury yesterday in attempting to lead the jury to believe that your gun was confiscated because of a gun violation?

A. It was confiscated by the East Cleveland Police because of a gun registration violation and because of the accident in East Cleveland.

Q. Was the registration violation first?

A. Yes.

Q. And secondary importance to the East Cleveland police is the fact that Calvin Heinz was killed with a bullet fired in his head?

(Tr. 4910-11). The judge overruled an objection to this question. *Id.*

A. Yes, it was, sir.

Q. Did you tell the police that Calvin drew on you first and you shot him in the head?

[O'Neal's Attorney]: Objection, your Honor.

A. The witnesses saw that.

THE COURT: Sustained as to the other matter. I think you made a point and you go on to some other matter. Strike that. Go on to some other matter. I think you made a point out of this.

(Tr. 4911). Nevertheless, the prosecutor continued to compare the Heinz killing to the Podborny killing. (Tr. 4911-15). He asked O'Neal to acknowledge that the evidence had shown that Podborny was shot with a bullet "consistent with being fired from a Smith & Wesson .38 caliber." (Tr. 4912). The judge overruled an objection to this question. *Id.* The prosecutor continued:

Q. The gun that you used to shoot Calvin Heinz was a .38 caliber Smith & Wesson pistol?

A. I didn't use it to shoot Calvin Heinz.

Q. Did the bullet come out of the barrel by itself?

A. That's the gun I used.

Q. Do you know of any other way of firing a bullet from a revolved other than pulling the trigger?

A. I didn't pull the trigger, it was an accident. I hit the gun.

Q. You shot him in the head?

A. I hit him in the head. He was trying to shoot me.

Id. The prosecutor next attempted to have O'Neal compare the bullet identified as coming from Podborny's body to the bullet in the East Cleveland case. He had O'Neal examine the bullet in evidence and acknowledge that testimony had established that "this is the pellet that killed Hank Podborny." (Tr. 4914). He continued:

Q. And the one that killed Calvin Heinz is like that is it not?

A. I don't know, sir.

Id. The prosecutor continued:

> Q. Sir, if we had the pellet from Calvin Heinz we could have been able to compare the pellet from Calvin Heinz with the pellet from Mr. Podborny, couldn't we?

(Tr. 4915). The judge overruled an objection to this statement.

The prosecutor also called a rebuttal witness at the close of trial. The witness testified that O'Neal was arrested in the East Cleveland matter and told the arresting officer, "That guy pulled a gun on me so I shot him." (Tr. 5696).

Ohio R. Evid. 404(B) excludes the admission of evidence of "other crimes, wrongs, or acts" to prove the character of the accused in order to show that the accused acted in conformity with his character on the occasion of the crime charged. *State v. Sims*, 3 Ohio App. 3d 321, 445 N.E.2d 235, 238 (1981). The evidence is considered irrelevant because, among other things, it creates an "overstrong tendency" to believe the accused guilty of the charge merely because he is a person likely to do such acts as well as the tendency to condemn because the accused has escaped punishment from other offenses. *State v. Curry*, 43 Ohio St. 2d 66, 68, 330 N.E.2d 720 (1975). The introduction of such evidence is prejudicial because it may completely overthrow the presumption of innocence. *See Pierce v. United States*, 86 F.2d 949, 952-53 (6th Cir. 1936).

There are certain exceptions to this general rule. Proof of other bad acts is admissible to show motive or intent, the absence of mistake or accident, or a plan or

system of doing an act. Ohio Rev. Cod Ann. § 2945.59 (Anderson 1987); *see also State v. Curry*, 43 Ohio St. 2d at 69. Also, where a defendant in a criminal trial testifies as to his past good behavior and character, the State is permitted to impeach such testimony with evidence of past criminal conduct. *See State v. Hale*, 21 Ohio App. 2d 207, 256 N.E.2d 239, 244-45 (1969), citing *State v. Marinski*, 139 Ohio St. 559, 41 N.E.2d 387 (1942). In such a case, the extent of the examination into the character or reputation of the accused shall be no more than necessary to counter the evidence of good character presented by the accused. *Id.* at 245.

Moreover, the State has a limited right to challenge the credibility of a criminal defendant by evidence of prior offenses when the defendant takes the witness stand and gives testimony in his own defense. *See State v. Tharp*, 49 Ohio App. 2d 291, 297, 361 N.E.2d 469 (1976); *State v. Patterson*, 43 Ohio App. 2d 63, 71, 332 N.E.2d 770 (1974). Questions as to prior convictions under state or federal law or questions eliciting defendant's admission of committing a prior criminal act are proper for testing the defendant's credibility. *State v. Tharp*, 49 Ohio App. 2d at 295-96. Questions as to prior arrests, indictments or accusations are improper for testing credibility "since arrests, accusations and indictments are not appropriate evidence of the actual commission of a crime which would affect credibility." *Id.* at 295, citing *Wagner v. State*, 115 Ohio St. 136, 152 N.E. 28 (1926); *see also Jones v. Haskings*, 343 F. Supp. 645, 652-53 (S.D. Ohio 1971), *aff'd*, 459 F.2d 479 (6th Cir.), *cert. denied*, 409 U.S. 990 (1972). In situations where the accused denies having committed a prior criminal act and the State offers no impeaching

testimony on that issue, questions as to whether the accused committed a prior criminal act are also improper "since there is nothing to, in fact, establish the commission of a prior offense" and credibility is thus left unchallenged. *State v. Tharp*, 49 Ohio App. 2d at 295.

The limitations placed on cross-examination to test a defendant's credibility rest in the sound discretion of the trial court, and the exercise of that discretion will not be disturbed in the absence of a clear showing that such discretion was abused. *Id.* In the cases where Ohio courts have found no abuse of discretion in admitting such testimony, the trial courts had issued cautionary instructions at the time the evidence was introduced as well as at the close of trial, limiting the receipt of the evidence to the issue of credibility only. *See, e.g., id.* at 298-99; *State v. Patterson*, 43 Ohio App. 2d at 71. The Ohio Court of Appeals has cautioned that the State embarks on the course of introducing prior bad acts "at its peril," and that "the moment the impeachment process by evidence of prior or subsequent offenses passes the fine lien separating the issue of credibility of the witness from the issue of the guilt of the defendant, prejudicial error intervenes." *State v. Patterson*, 43 Ohio App. 2d at 72.

In the instant case. O'Neal's attorney initially attempted to limit O'Neal's direct testimony regarding the East Cleveland matter to establish that O'Neal paid the $6,500 he received from Toney in legal fees and to show that his weapon was registered. However, he than foolishly went on to elicit testimony that O'Neal would not kill someone with a registered weapon. This opened the door for possible cross-examination on this issue.

The door having been opened, the prosecutor burst through it with a salvo of improper questions. He established that the East Cleveland matter was a case in which O'Neal had been accused of shooting Calvin Heinz in the head, and suggested this was the same manner in which he shot Podborny. He then coaxed an admission from O'Neal that it was indeed he who had shot Heinz in the presence of numerous witnesses. He also called a rebuttal witness to establish that O'Neal had admitted shooting Heinz. Finally, he attempted to compensate for the lack of scientific evidence showing the fatal bullet came from O'Neal's revolver by having O'Neal compare the bullet in the instant case to the one in the East Cleveland case.

During the course of this colloquy, the judge continuously overruled objections by O'Neal's counsel. He eventually sustained an objection, but only on the basis that the prosecutor had already made his point. The judge neither considered the relevance of this evidence nor balanced the risk of prejudice in receiving this evidence against its relevance and need. At no time did the judge issue a cautionary instruction or an instruction limiting the questioning to the issue of O'Neal's credibility. Only one such instruction was given, much too late, during the charge to the jury at the close of trial.

Assuming, *arguendo*, that O'Neal's counsel opened the door to the prosecutor's questions about the Heinz shooting, the prosecutor went too far. He suggested to the jury that O'Neal shot Heinz the "same way [he] shot Henry Podborny in the head" and that the Heinz shooting was more than an accident or act of self-defense. This questioning was improper, particularly since the facts of the Heinz shooting had never been determined by a jury.

See State v. Tharp, 49 Ohio App. 2d at 295. While this evidence had minimal relevance to the case at hand, it created a strong risk that the jury would use the evidence of the prior shooting for the improper purpose of finding O'Neal had the propensity to kill Podborny because he had killed another man or would convict him of the instant charges because he had escaped punishment for the prior shooting. *See State v. Curry*, 43 Ohio St. 2d at 68; *cf. United States v. Bakke*, 942 F.2d 977, 981-82 (6th Cir. 1991).

The prosecutor's improper cross examination, therefore, was sufficiently prejudicial to trigger further inquiry whether such conduct deprived O'Neal of a fundamentally fair trial.

2. The Prosecutor's Inflammatory Argument Prejudiced O'Neal

We consider the improper argument for two reasons. First, because there is a due process fair trial issue, we must examine the entire trial process for fairness. *Lundy v. Campbell*, 888 F.2d 467, 472 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 2212 (1990). Second, the improper arguments are an extension of the improper introduction of inflammatory evidence and the improper cross-examination of O'Neal; thus, they are part and parcel of the issues O'Neal raises.

In their opening and closing arguments, the prosecutors referred to the Heinz killing two times. These references crossed the line separating the issue of credibility from the issue of guilt. *See State v. Patterson*, 43 Ohio App. 2d at 72. On the first occasion, the prosecutor said that

O'Neal's "little problem in East Cleveland" was "in all actuality . . . the killing of another human being." (Tr. 5809). On the second occasion, prosecutor Marino stated:

> [O'Neal] not only lied about being crazy about killing a man with a registered gun, counsel misled you, he further lied about how it occurred. "I hit him on the head and the gun went off." You show me one gun that is fired by hitting someone with the gun. You have to pull the trigger. He is going to complain it is a defective gun. Where is that gun?
>
> * * *
>
> Which of you could shoot me first if I pulled a gun on you? . . . I also wonder about those situations. A guy pulled a gun on me so I shot him. Great.

(Tr. 6087-88). The judge overruled an objection to this argument. The latter statements improperly refer to facts not in evidence. No evidence was introduced on the subject of whether a gun can be fired by hitting a person with it, and no evidence was presented on whether a person could shoot another who had "pulled" a weapon first. The statements carry a great degree of credibility, coming from a state official charged with prosecuting criminal offenses. The jury was likely to accept these remarks as though they were credible testimony. These arguments could only have been intended to support the highly improper suggestion Marino made during O'Neal's cross-examination that O'Neal had intentionally murdered Heinz and thus must have murdered Podborny. The impact of this suggestion was magnified,

because it came in the form of an opinion of a state official charged with the duty of investigating and trying criminal cases.

The prosecutor engaged in further misconduct during his closing argument by using the gruesome evidence of the victim's clothing and wrappings to appeal to the jury's passion:

> You are going to have [Mr. Podborny's] clothes back there. Grab those things, they stink, they've got blood on them. Wrap yourself in that blanket and see what the victim of a murder is like.
>
> * * *
>
> Put a sheet over you, put the plastic over you. I tell you this now because this is what the case is all about.
>
> * * *
>
> As I said, I asked you to do this, to get into the case, to really handle the case. You can always wash up later, folks.

(Tr. 6121-23). The prosecutor's improper reference to the crowbar in closing argument was also inflammatory. He advised the jury to "pick that crowbar up, you get dirt on your hands, you tell me about it." (Tr. 6120-21).

Had the jury followed this argument literally, one can picture the twelve jurors seated around a conference table in the jury room, each wearing an item of the blood-stained clothing the victim was found in, each in turn lifting the crowbar, while viewing the gruesome photographs of the corpse. In this manner, they would deliberate O'Neal's fate. Such appeals to the juror's passions are

unconscionable. They diverted the juror's attention from their task of examining and weighing the evidence objectively, and urged them to convict O'Neal for reasons legally irrelevant to his guilt or innocence. *See United States v. Solivan*, 937 F.2d 1146 (6th Cir. 1991). *Cf. State v. Thompson*, 33 Ohio St. 3d 1, 514 N.E.2d 407, 420-21 (1987). Upon studying the closing argument, it becomes clear that the prosecutor introduced the gruesome evidence for the express purpose of enabling him to make an inflammatory argument at the conclusion of the case.

The prosecutors' improper arguments, therefore, were sufficiently prejudicial to trigger further inquiry whether such conduct deprived O'Neal of a fundamentally fair trial.

VI. The Improper Jury Instructions, Combined With The Prejudicial Trial Errors, Deprived O'Neal Of His Right To a Fair Trial

Although the admission of inflammatory evidence and the prosecutor's conduct at trial was prejudicial to O'Neal, his conviction will be upheld unless the errors, taken as a whole, rendered the trial fundamentally unfair. *See Lundy*, 888 F.2d at 472. Respondent has the burden of proving that the erroneous jury instructions constituted harmless error. *Clark v. Jago*, 676 F.2d at 1105. On the other hand, O'Neal has the burden of establishing that the nonconstitutional trial errors and prosecutorial misconduct amounted to constitutional error. *See United States ex rel. Miller v. Greer*, 789 F.2d 438, 443-44 (7th Cir. 1986) (en banc), *rev'd on other grounds sub nom. Greer v. Miller*, 483 U.S. 756 (1987). *Cf. United States v. Lane*, 474 U.S. 438,

460-61 (1986) (Brennan, J., concurring). He must demonstrate that the errors "tilted the scales in favor of a guilty verdict." *See Webster v. Rees*, 729 F.2d 1078, 1081 (6th Cir. 1984); *see also Walker v. Engle*, 703 F.2d 959, 968 (6th Cir.), *cert. denied*, 464 U.S. 951, 962 (1983). Nevertheless, the erroneous jury instructions may be considered together with the nonconstitutional trial errors to determine whether O'Neal was accorded a fair trial.

We agree with the following statement by Judge Ryan on behalf of the United States Court of Appeals for the Sixth Circuit regarding the elements of a fair trial claim:

> Tomes have been written about the meaning of due process under the fourteenth amendment. But we have searched in vain for any useful, authoritative statement by the Supreme Court, or by the countless other writers who have addressed the subject, defining the elements, the criteria, the immutable components of a fair trial within the meaning of the due process clause of the fourteenth amendment. The accumulated precedent and scholarship on the subject instructs us that procedural due process is, in the last analysis, simply the court's notion of "fundamental fairness," *Rochin v. California*, 342 U.S. 165, 172 (1952), and compliance with the principles "implicit in the concept of ordered liberty."

Lundy, 888 F.2d at 470.

The latest pronouncement on this subject by the Supreme Court indicates that trial errors and "most constitutional errors can be harmless." *Arizona v. Fulminante*, 111 S.Ct. 1246, 1263 (1991). Such errors, which occur during the presentation of the case to the jury, may be

"quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 1264. Other constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error. *Id.* The majority in *Fulminante* considered the latter to be "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.* at 1265. Following *Fulminante*, we must determine whether the prejudicial actions outlined above were "structural defects" in O'Neal's trial or whether they must be analyzed under a harmless error standard.

We seriously doubt that O'Neal could have received a fair trial in the emotional atmosphere created by the introduction of unnecessary and gruesome evidence; the evidence of a prior killing committed by O'Neal where the victim was shot in the head; the prosecutor's inflammatory argument designed to stir the passions of the jurors; and the effective endorsement of such actions by the trial judge through his overruling defense objections, failing to weigh the prejudice of such evidence, and failing to give prompt cautionary instructions.

Relevant factors to consider regarding prosecutorial misconduct are: 1) the degree to which the improper remarks have a tendency to mislead the jury and to prejudice the defendant, 2) whether they were isolated or extensive, and 3) whether they were deliberately or accidentally placed before the jury. *Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982) (en banc), quoting *United States v. Leon*, 534 F.2d 667, 678 (6th Cir. 1976).

The admission of twenty gruesome photographs of the victim and the other inflammatory physical evidence, coupled with the prosecutor's improper arguments regarding such evidence, were designed to influence the jury to convict O'Neal out of sympathy for the victim and passion concerning the nature of the killing as well as to punish O'Neal for the vileness of the deed, rather than on the basis of the evidence. Moreover, the prosecutor's excessive questioning regarding the details of the Heinz killing, coupled with his improper argument concerning that evidence, could have influenced the jury to convict O'Neal solely to punish him for killing another man, thus adding to the possibility that O'Neal was convicted for reasons that had nothing to do with the objective evidence presented regarding Podborny's kidnapping and murder. The prosecutor's prejudicial questions and remarks were extensive rather than isolated. The trial judge's effective endorsement of these actions encouraged the jury to give them their full prejudicial effect.

The obvious purpose and the likely result of such inflammatory evidence and improper arguments was to cause the jury to abandon its impartiality in weighing the evidence. Added to that are the confusing jury instructions and the improper prosecution argument concerning them, which could have led a reasonable juror to conclude that O'Neal could be convicted of each crime absent specific intent, so long as his accomplices had the necessary specific intent. Furthermore, although the Supreme Court has forclosed [sic] this issue as an independent ground for constitutional error, it is important to note that O'Neal was intentionally deprived of the presence of any juror of his race to deliberate his fate.

Following the mechanical approach in *Fulminante* of dividing fair trial issues into two exclusive categories, we believe the circumstances outlined above created a "structural defect" in the trial. To paraphrase the Court in *Fulminante*, in the absence of an impartial jury, " 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.' " 111 S.Ct. at 1265, quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986).

On the other hand, the Supreme Court's admonition that trial errors and most constitutional errors can be harmless, 111 S.Ct. at 1263, indicates it would be wise to make a harmless error analysis.

Under the harmless error analysis, if review of the entire record reveals that the evidence of guilt is overwhelming, even a substantial error will not transform an otherwise fair trial into an unfair trial because it is likely that the error had little, if anything, to do with the jury's verdict. *See, e.g., Kirby v. Dutton*, 831 F.2d 1280, 1283-84 (6th Cir. 1987); *Webster v. Rees*, 729 F.2d at 1081; *Cook v. Bordenkircher*, 602 F.2d 117, 121 (6th Cir.), *cert. denied*, 444 U.S. 926 (1979). *See also Lundy v. Campbell*, 888 F.2d at 481. The "entire record" refers to all that occurred from the empanelment of the jury to the return of the verdict. *Id.* It includes, among other things, the quality and quantity of the evidence of the defendant's guilt; the extent to which the evidence of guilt was consistent or inconsistent, contradicted or uncontradicted, and clear or vague; the manner in which the evidence was presented; the interest or bias of the witnesses; whether witnesses' testimony was impeached; the extent of defense counsel's objections to

the practices now assailed as unfair; and everything the jury saw and heard, such as legal arguments, objections, evidentiary rulings and the court's instructions to the jury. *Id.* at 472-73. Although reviewing courts cannot know the actual impact the errors had on a jury, they must strive to "evaluate the likely effects . . . , based on reason, principle, and common human experience." *Estelle v. Williams*, 425 U.S. 501, 504 (1976); *see also Holbrook v. Flynn*, 475 U.S. 560, 567-68 (1986); *Illinois v. Allen*, 397 U.S. 337, 344 (1970).

At trial, the State introduced the following evidence of O'Neal's guilt.

Toney testified that O'Neal was present at his saloon on January 29, 1981, when she left Mr. Podborny there, according to a prearranged plan. (Tr. 1855-58). She said she waited for several minutes, at which time O'Neal came out and brought her Podborny's keys, wallet and travelers' checks. (Tr. 1859). Toney testified that Allen came from the Saloon, entered the back seat of her car, and said he had hit Mr. Podborny on the legs with a pipe so he could not run. (Tr. 1862). A police officer testified that Allen and O'Neal admitted that Mr. Podborny was brought to O'Neal's place; that he was forcibly restrained at that time; that O'Neal gave Mr. Podborny's personal effects to Toney, who was waiting outside; and that Allen later came out saying he had hit Podborny with a pipe in the legs. (Tr. 4446, 4464-65). They claimed that an unknown black male was involved in apprehending Mr. Podborny. Allen stated that he did not actually strike Mr. Podborny in the legs, even though he acknowledge to Toney that he had, and that when he returned to O'Neal's

bar later that evening, Mr. Podborny was gone. (Tr. 4447, 4460).

Physical evidence admitted at trial tended to show that Podborny was killed in O'Neal's bar. Blood was found on a mirror square, panels, and ceiling tile in the bar. Scientific test results showed that the blood from the panels matched the blood found on the victim's shirt. (Tr. 3684). There was testimony that no more than six percent of the population has that blood type. (Tr. 3685-86). Other tests demonstrated that the manner in which the blood spattered was consistent with Mr. Podborny's height. (Tr. 3693). There was further testimony that paint found on the victim's body was similar to paint from O'Neal's bar in color tint and porosity, although no conclusive match could be made. (Tr. 3653). Finally, O'Neal's counsel conceded in closing argument that Podborny was killed in O'Neal's saloon. (*See* Tr. 5841).

Tape recordings of phone conversations between Toney and Allen, which occurred on March 25, 1981, after Toney had been apprehended and before Allen's arrest, were introduced. In the first conversation, Toney asked Allen to tell O'Neal that "we have got a doctor up here that's going to certify Hank and commit him . . . so it's important that I get him . . . alive." (Tr. 4983). Instead of denying knowledge about Mr. Podborny or his whereabouts, Allen responded by asking, "You need him there?" *Id.* When Toney told Allen that Mrs. Podborny would get everything once Podborny was committed, Allen asked, "It's going to be Dimple's?" (Tr. 4984). Toney responded, "Right. But Hank has to show up, you know." *Id.* At that point, Allen again asked, "You mean you need

him there?" When Toney answered in the affirmative, he said, "Okay. I'll get right to him." *Id.*

In another taped conversation with Toney, Allen asked, "You ain't said nothing about nothing to that doctor, have you?" (Tr. 5006). When Toney told Allen "no," the conversation continued:

> Allen: [D]on't say nothing to him about that.
>
> Toney: What do you mean?
>
> Allen: Uh, about anything. You know, about, you know, that package.
>
> • • •
>
> Toney: Dimple already told the doctor some things and got it all set. . . .
>
> Allen: Oh no. . . .
>
> • • •
>
> Toney: Is he in pretty good condition?
>
> Allen: Yeah.
>
> Toney: Okay. Because you know. . . .
>
> Allen: That package is in good condition.
>
> Toney: Okay. 'Cause if, you know, this doctor, we don't want another witness.
>
> • • •
>
> Allen: Well, sure don't, that's why I said don't say nothing about the package.
>
> • • •
>
> Toney: Is, uh, he on any kind of drugs? 'Cause that doctor can tell. That, you know, the package.

> Allen: Okay. Well, meanwhile until you hear from him, don't do nothing till [sic] you hear from him, okay?
>
> Toney: Uh, Lloyd, it's, it's more money than we ever thought of having.
>
> Allen: 'Cause it'll be best not to even say nothing until and see what he's going to say first. Okay?
>
> Toney: Well, but we'll lose the money if we, if we can't deliver.
>
> Allen: Uh, uh. I know it. But then you know how he is.

(Tr. 5007-12).

Wilbur Higgins testified that, when he visited O'Neal in jail on April 2, 1981, O'Neal said that he and Allen had killed a man and had placed his body in the field next to Higgins' home. (Tr. 3726-27). Higgins testified that O'Neal asked him to go out in the field and cover the body, saying that his life was in Higgins' hands. (Tr. 3726). Higgins said he never went to the field because he did not want to become involved and he notified a city inspector of the body's location two weeks later. (Tr. 3728). Higgins also said that, one night during the winter of 1981, he saw O'Neal and Allen with a car parked at the back of his building. (Tr. 3730). O'Neal told Higgins that he and Allen "had two womans [sic] back there in the car," and asked Higgins "to leave for a while." (Tr. 3730-31). Higgins did not see any women and left. *Id.* The car was parked approximately ten to twelve feet from where Mr. Podborny's body was later found. (Tr. 3733).

Although the evidence against O'Neal was substantial, it was not overwhelming. The testimony of Toney and McLean must be viewed with caution because they were admitted accomplices. *See* Ohio Rev. Code §§ 2923.01(H)(2) and 2923.03(D). Toney's testimony was contradicted by McLean, who provided a radically different version of the events related to him by Toney. The State presented no evidence regarding O'Neal's continuing presence in the saloon where the victim was apparently murdered. O'Neal testified that he had a separate residence and other business investments. Thus, the possibility existed that Podborny could have been murdered in O'Neal's saloon without O'Neal's knowledge. O'Neal denied his alleged oral statement to police, and no written statement existed.

O'Neal's theory at trial was that Toney and Gabbard kidnapped Podborny and murdered him in O'Neal's saloon without O'Neal's knowledge. (Tr. 5840-43). Both Allen and O'Neal testified and denied involvement in the robbery, kidnapping or murder. (Tr. 4868, 4873, 4961). O'Neal denied seeing any blood in his saloon and said he did not know how the blood got there. (Tr. 4898). O'Neal and Allen both testified that Toney had a set of keys to O'Neal's bar. (Tr. 4900, 4902). Allen testified that he was beaten to coerce him to make and sign a statement corroborating Toney's version of the events. (Tr. 4959). Allen also explained that he had trouble hearing Toney in her phone conversations with him and that his impression was that she was referring to O'Neal, "as far as putting him in a hospital for his hernia operation." (Tr. 4947-48).

Most importantly, Higgins' credibility was seriously undermined at trial. O'Neal denied that he told Higgins

he and Allen had killed Podborny and that he asked Higgins to cover the body. (Tr. 4860). On cross-examination by O'Neal's counsel, Higgins stated that he was arrested and held in jail for five hours before he told his story to the police. (Tr. 3758-59). Although Higgins said he decided to talk to the police out of his "own free will" and they did not put words in his mouth, he admitted telling defense counsel in an interview at his home that he signed a statement for the police because they threatened he would be charged with murder if he did not do so. (Tr. 3761, 3776, 3783, 3789).

The above analysis demonstrates that the jury had substantial credibility issues to resolve. The improper instructions on state of mind could have led the jury to convict even if they believed O'Neal's version of events, on the basis that O'Neal had been involved in a conspiracy to obtain money from either Mrs. or Mr. Podborny that eventually led to kidnapping, robbery and murder. *See* discussion *supra*, pp. 18-24. The impartial atmosphere in which the jury should have resolved these issues was destroyed by the needless introduction of gruesome evidence, the prosecutor's inflammatory argument regarding said evidence, the prosecutor's improperly establishing that O'Neal had previously killed a person by shooting him in the head with his revolver, and by the prosecutor's improper suggestion that the previous killing was credible evidence that O'Neal was guilty of Podborny's murder. Additionally, the prosecutor intentionally deprived O'Neal of jurors of his own race to help determine his guilt. We find it impossible to conclude that these factors "pale into relative insignificance"

in the face of the record evidence of O'Neal's guilt. *See Lundy,* 888 F.2d at 481.

For all these reasons, we conclude O'Neal did not receive a fair trial.

VII. The Failure of the Ohio Court of Appeals to Address an Assignment of Error Deprived O'Neal of Due Process of Law

O'Neal claims that his rights under the fourteenth amendment were violated when the Ohio Court of Appeals failed to address his state law claim that the trial court erred in denying his motion for a separate trial. O'Neal raised that claim as an issue on appeal in his seventh assignment of error.

The first six assignments of error were filed in two separate briefs on July 15 and 26, 1982. (Doc. 10, Ex. D, p.9). On May 12, 1983, O'Neal filed a motion to file a supplemental brief instanter adding the seventh assignment of error. (Doc. 49, App. A-224). That motion was allowed on June 3, 1983. *Id.*, App. A-114. However, in its opinion affirming the trial court's judgment, the Appeals Court did not address the seventh assignment of error. (Doc. 10, Ex. C). Only Judge Stillman addressed the issue in his dissenting opinion. He concluded that the trial court's judgment should have been reversed on the ground that the individual defendants in the Podborny cases should have been tried separately from one another. *Id.*

On July 30, 1985, O'Neal filed a motion for reconsideration requesting the Appeals Court to address the

seventh assignment of error. (Doc. 49, App. A-250). On September 4, 1985, the Appeals Court denied the motion in a two-to-one decision without stating any reasons for the denial. *Id.*, App. A-115. After the Ohio Supreme Court dismissed O'Neal's appeal, O'Neal filed a complaint for writ of mandamus with the Ohio Supreme Court seeking an order requiring the Appeals Court to rule in writing on O'Neal's seventh assignment of error. *Id.*, App. A-217. On April 2, 1986, the Ohio Supreme Court denied the writ without opinion. *Id.*, App. A-278.

Ohio R. App. P. 12(A) provides that "[a]ll errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error." As a matter of state law, failure to rule on an assignment of error presented on appeal constitutes reversible error, requiring remand to the Appeals Court for compliance with Rule 12(A). *State v. Jennings,* 69 Ohio St. 2d 389, 433 N.E.2d 157 (1982); *Lumbermen's Underwriting Alliance v. American Excelsior Corp.,* 33 Ohio St. 2d 37, 294 N.E.2d 224 (1973); *Rothfuss v. Hamilton Masonic Temple Co.,* 27 Ohio St. 2d 131, 271 N.E.2d 801 (1971).

The parties have not cited, nor could the Court find, any case addressing the specific issue presented here – whether the failure to rule on an assignment of error presented on appeal, as required by state law, constitutes a violation of the fourteenth amendment. In *Smith v. Lockhart,* 882 F.2d 331, 334-35 (8th Cir. 1989), *cert. denied,* 110 S.Ct. 739 (1990), the Eighth Circuit held that federal habeas relief was not available to a petitioner who claimed that he was denied due process when the trial court violated its procedural rules by denying his motion for post-conviction relief without a hearing and without

making written findings. The court reasoned that there is no constitutional right to state post-conviction review of convictions and that petitioner had not alleged the violation of any constitutional standard which could apply to the state's post-conviction review process in general or to the facts of that case in particular. *Id.* This case is distinguishable from *Lockhart* in that O'Neal claims that he was denied due process based on the failure of the Appeals Court to address a claim on his first appeal as of right.

It is well-settled that the Constitution does not require states to grant appeals as of right to criminal defendants seeking review of alleged trial errors. *Evitts v. Lucey,* 469 U.S. 387, 393 (1985). However, once a state does provide the right to appeal following a criminal conviction, the appeal process must comport with the fourteenth amendment's guarantees of due process and equal protection. *Id.* at 393, 403; *see also Douglas v. California,* 372 U.S. 353, 356-57 (1963); *Griffin v. Illinois,* 351 U.S. 12, 18 (1956). Under the fourteenth amendment, the State must provide a free transcript of the trial to indigent criminal appellants if that is the only way to assure an adequate and effective appeal. *Evitts,* 469 U.S. at 393, citing *Griffin,* 3511 U.S. at 20. Moreover, a first appeal as of right is not adjudicated in accord with due process if the criminal appellant does not have the effective assistance of counsel or is not provided with an impartial and disinterested tribunal on appeal. *Id.* at 396; *Bradshaw v. McCotter,* 785 F.2d 1327, 1329, *modified on reh'g on other grounds,* 796 F.2d 100 (5th Cir. 1986). A delay in the determination of a direct appeal also may violate the fourteenth amendment guarantees of due process and equal protection. *See Burkett v. Cunningham,* 826 F.2d 1208,

1221 (8th Cir. 1987); *Mitchell v. Zimmerman,* 582 F. Supp. 186, 187 (E.D. Pa. 1984). In addition, the denial of a criminal appellant's request to proceed on appeal *in forma pauperis* may deprive the appellant of his constitutional right to equal protection. *Harris v. Rees,* 794 F.2d 1168, 1175-76 (6th Cir. 1986).

The purpose of a first appeal provided as of right by a state is to determine whether the individual defendant has been lawfully incarcerated and to ensure a correct adjudication of guilt or innocence. *See Evitts,* 469 U.S. at 402; *Griffin,* 351 U.S. at 18-19. By deciding that an appeal is so important that it must be available as a matter of right, the State itself recognizes that the appeal plays such a crucial role that it cannot be decided arbitrarily; nor can the State otherwise deny an appellant fair procedure. *Burkett,* 826 F.2d at 1221, citing *Evitts,* 469 U.S. at 404. Due process concerns are implicated when the State fails to assure a criminal defendant an adequate opportunity to present his claims and to obtain a final determination on the merits of the appeal. *Evitts,* 469 U.S. at 402, 405; *see also Burkett,* 826 F.2d at 1221; *Galloway v. Stephenson,* 510 F. Supp. 840, 842 (M.D.N.C. 1981). Equal protection concerns are implicated when the State treats a class of defendants differently for purposes of offering them a meaningful appeal. *Evitts,* 469 U.S. at 405.

In this case, the Appeals Court essentially deprived O'Neal of a fair opportunity to obtain an adjudication on the merits of his first appeal when it refused to address his seventh assignment of error in accordance with state appellate procedural rules. O'Neal was entitled to a ruling on the seventh assignment of error, particularly in light of the fact that one of the three appellate judges

concluded that the seventh assignment of error merited reversal of O'Neal's conviction. By failing to rule on this arguably meritorious claim, the majority opinion undermined the very purpose of providing a first appeal of right – to assure that the defendant is lawfully incarcerated.

Respondent argued in its memorandum opposing jurisdiction to the Ohio Supreme Court that because the seventh assignment of error was filed in a third filing approximately one year after the initial filings of assignments of error, the Appeals Court either overlooked the claim or deliberately disregarded it as untimely filed. (Doc. 10, Ex. D, p.9). However, even if it was untimely filed, the Appeals Court allowed O'Neal's motion to file a supplemental brief instanter adding the assignment of error, thereby permitting the issue to become part of the record. The Appeals Court could not have overlooked the claim, because one of the judges ruled on it in dissent, and the court denied O'Neal's subsequent motion for reconsideration explicitly seeking a ruling on the seventh assignment of error. Rather, it appears the majority of judges intentionally ignored the claim.

Respondent further argues that O'Neal was not prejudiced by the failure of the Appeals Court to rule on the assignment of error because the issue was addressed by that court in each of O'Neal's co-defendants' cases. (Doc. 59, p.36). However, when a criminal defendant is deprived of his right to a complete and effective appeal, he need not demonstrate that he was prejudiced or that he has arguable grounds for a successful appeal. *Galloway*, 510 F. Supp. at 844, citing *Rodriquez v. United States*, 395 U.S. 327 (1969). "[W]hen the right to appeal itself is lost, the fairness of the proceeding is immediately

impugned, without any further showing of harm being necessary." *Id.*, at 844 n.4; *cf. Mitchell*, 582 F. Supp. at 188.

Accordingly, the failure of the Appeals Court to rule on O'Neal's seventh assignment of error violated O'Neal's right to due process of law under the fourteenth amendment. The remedy for this violation is a fair appellate review of the unaddressed claim, or, if no appellate review is afforded, issuance of a writ of habeas corpus. *See Reynolds v. Lockhart*, 497 F.2d 314, 316 (8th Cir. 1974); *see also Dowd v. Cook*, 340 U.S. 206, 210 (1951).

IT IS THEREFORE RECOMMENDED THAT:

1. O'Neal's petition for writ of habeas corpus be DENIED as to the following claims:

   (a) Claim that O'Neal should not have been tried with his co-defendants;

   (b) Claim challenging the racial composition of the jury.

2. O'Neal's petition for writ of habeas corpus be GRANTED unless respondent retries O'Neal within ninety (90) days of the date of this Court's final judgment, or within such further time as the Court may allow for good cause shown, based upon the following claims:

   (a) Claim of constitutionally defective jury instructions;

   (b) Claim that prosecutorial misconduct and erroneously admitted evidence deprived O'Neal of a fundamentally fair trial.

3. In the event the District Judge does not adopt recommendation 2 above, O'Neal's petition for writ of habeas corpus as to the claim of a denial of due process of

law based on the Ohio Court of Appeals' failure to address an assignment of error should be GRANTED. Counsel for O'Neal should be ordered to file a motion to reinstate the appeal with the Eighth District Court of Appeals of Ohio within 30 days of this Court's Order. In the event that the appeal is not reinstated within 60 days of the filing of O'Neal's motion, his petition for writ of habeas corpus should be granted and O'Neal should be released pending further proceedings. The respondent should be ordered to notify the Court in writing upon reinstatement of the appeal and to file a motion to dismiss this action. O'Neal should notify the Court in writing upon expiration of the 60 day period if the appeal is not reinstated.

Date: 1-22-92

/s/ Robert A. Steinberg
Robert A. Steinberg
United States Magistrate
Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL
Petitioner

vs

ARTHUR TATE JR.,
Respondent

Case No.
C-1-86-0976

APPENDIX A
TO REPORT AND RECOMMENDATION

The jury instructions given by the trial court on the offenses charged against O'Neal and his co-defendants, as well as on conspiracy and complicity, are attached in relevant part as follows:

Aggravated murder, therefore, is the killing of another purposely and with prior calculation and design. Before you can find the defendants Robert O'Neal, Lloyd Allen, Dimple Podborny guilty of aggravated murder, you must find beyond a reasonable doubt, ladies and gentleman, that first that Henry Podborny was a living person and that his death was caused by the defendants, or by a conspirator, co-conspirator or one aiding and abetting the defendants. . . .

Secondly, that the killing was done purposely and, thirdly, that the killing was done with prior calculation

and design, and, fourthly, that the act was an [sic] unlawful done willfully.

(Tr. 6158-59).

• • •

Purpose to kill is an element of the crime of aggravated murder. A person act purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the minds of the defendants or co-defendants or aiders and abettors, if you so find, a specific intention to kill the decedent Henry Podborny.

The Court in order to assist you in understanding the meaning of purpose or purposeful herein would give you this kind of special – will give you this instruction. Wherein the evidence may disclose the existence of complicity by way of an aider and abettor or a conspiracy, the law of the state of Ohio is as follows: As state in the leading case in the matter where you have an unlawful act contemplated in the original conspiracy, although not identical with or similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was performed was reasonable or likely to produce the death of another, then each conspirator, or aider and abettor is equally guilty as the principal offender of the homicide.

Although such conspirator, or aider and abettor as a conspirator was neither present [n]or had knowledge of the physical killing, or the weapon used.

Now, a person acts purposely when the gist of the offense is a prohibition of conduct against a certain

nature regardless of what the offender intended to accomplish. Therefore, if it is the specific intention and purpose to engage in an act of that nature, then the specific conduct or objective in producing a certain act results or engaged at the time specific conduct to do an act. Purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

(Tr. 6159-61).

• • •

Now, if a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life and to inflict great bodily harm, the purpose to, intent to kill may be inferred from the use of the weapon.

(Tr. 6161).

• • •

Now, ladies and gentlemen, the Court will continue to define the various elements and I will define purpose again to robbery and kidnapping in a few moments. Being aggravated robbery and kidnapping, having the elements of purpose, now prior calculation and design is an essential element of the crime of aggravated murder.

Prior calculation and design means that the purpose to kill was reached by the defendants through a definite process of reasoning in advance of the killing, which process of reason must have included a little plan involving a study consideration of the method, the means or the instrument which kills another or a weapon used to kill another.

No definite period of time must have elapsed, or no particular amount to consideration must be given to the prior calculation and design to kill, but acting on the spur of the moment or after monetary consideration of the purpose to kill is not sufficient to constitute the crime of prior calculation and design – strike that. Constitute the crime prior calculation, or the prior calculation and design needed to meet the element required for aggravated murder.

If you find from the evidence that the defendant or the co-conspirators, co-conspirator, either individually or co-conspirators, or aider and abettor were actually performing the act to kill and this purpose was arrived at with prior calculation and design before he or she performed the act, that is sufficient for this element of the crime of aggravated murder.

(Tr. 6162-63).

* * *

The Court would indicate at this time in this particular case we have multiple defendants. We have three. And we discussed separating the question of guilt or innocence with each one of these defendants. You must separately consider the elements applicable to each one of the defendants as he or she were separately tried and you must separate it in your finding, as I will explain, to each defendant. You must state your finding to each count separately, also, and to each defendant uninfluenced by the verdict as it relates to the other defendants.

The counts, three separate counts, have to be considered separately. The defendants, each and every one of

them, may be found guilty or not guilty as to any one or all of the charges set forth in the indictment.

(Tr. 6165).

* * *

"No person in attempting or committing a theft offense as defined in Section 2913.01 of the Ohio Revised Code, or in fleeing immediately after such offense, or offenses, shall do either of the following –" And I have paraphrased this, either have a deadly weapon or dangerous ordinance as defined under 2923.11 on or about his person or under his control or in the alternative, inflict or attempt to inflict serious physical harm on another.

The elements briefly, from the definitions are that these defendants, or co-conspirators, or one which you find to be an aider and abettor, inflicts serious harm or attempts to inflict serious harm on another, or in the alternative that the defendant has a deadly weapon or dangerous ordnance on or about his person or under his control and that the defendant was either, in either case, was committing or attempting to commit a theft offense, or anything immediately thereafter of a felony, normally the Court would indicate that the defendants are charged with aggravated robbery.

And before you can find the defendants guilty, you must find beyond a reasonable doubt that on or about the 29th day of January, 1981, here in Cuyahoga County, that the defendants or an aider and abettor or co-conspirator, did obtain or attempt to obtain property of some value,

however small, for the purpose of depriving Henry Podborny of that property and the defendant had a deadly weapon or dangerous ordnance on or about his or her person or under her control. Or in the alternative, you will consider the alternative of serious physical harm, that is the defendants inflicted serious harm upon the person of Henry Podborny.

Now, those are the elements of aggravated robbery conspired in this case.

Now, purpose again is an essential element of the crime of aggravated robbery. Purpose to deprive the owner of his property and to obtain the property is an essential element of aggravated robbery. And once again a purposeful act, purposely is the specific intention to obtain certain results. And in this case it must be established at the time in question there was intent in the mind of the defendants and/or co-conspirators, or aiders and abettors in complicity, a specific contention to obtain the property of Henry Podborny.

Now to determine the purpose from which the person acts, does an act or brings about a specific result, is determined by the manner in which it is done, the means or weapon used and the weapon used and all other facts and circumstances in evidence. As to the issue – as to the issue, rather, of a deadly weapon or dangerous ordnance, a deadly weapon, I have explained it one way. There is another way to explain it.

(Tr. 6165-68).

* * *

Deadly weapon is an object or instrument also of such size and weight and of such design and shape that it may be grasped in the hand in such a way that it may be used upon or directed against the body of another in a manner with such force to injure or kill the other – another person.

(Tr. 6168-69).

* * *

In conclusion, the Court would indicate to you as it relates to count number two, aggravated robbery. If you find that the State of Ohio has proven each and every essential element of the crime of aggravated robbery as against the defendants, those who you find as co-conspirators, or aider and abettor, in that on January 29th, you found that they did unlawfully and purposely did in attempting to commit a theft offense as defined in 2913.01 and a theft offense, robbery is a theft offense, stealing is a theft offense.

In committing a theft offense, or in attempting to commit, fleeing thereafter, such offense upon Henry Podborny the defendants did have a deadly weapon or dangerous ordnance, to wit, a gun as alleged in the indictment, a gun on or about his person or under their control or if you find beyond a reasonable doubt in the alternative that on or about the 29th day of January, the defendants or co-conspirators or aiders and abettors or persons acting in concert with them unlawfully and purposely in attempting to commit a theft offense or in fleeing immediately after such attempt or offense upon Henry Podborny did inflict or attempt to inflict serious physical harm upon Henry Podborny then you should

find the defendants guilty in the aggravated robbery, second count.

(Tr. 6170-71).

* * *

Now, the third count in this case involving kidnapping under 2905.01. And that statute reads as follows:

"No person by force, threat or deception or by any means shall remove another from the place where he is found, or restrain him of his liberty for any of the following purposes," and the purposes alleged in this statute that are alleged in the indictment are as follows: To facilitate the commission of any physical, any or, flight thereafter. That's under two of the statute.

Three, to terrorize or inflict serious harm on the victim or another. Therefore, you have these several elements as follows, it [sic] wit, one, that the defendant removes another, defendants, and when I say defendants I'm talking also about co-conspirators and aider and abettors, the defendants removed another from a place where he is found. And the defendants restrained another of his liberty and, two, that the means of removal or restraint is by either force, threat or deception. And, three, that the defendants purpose is to facilitate the commission of any felony or flight after the commission of a felony or in the alternative it is an either-or situation, again, is to terrorize the victim or to inflict serious physical harm to the victim.

That's the short form. I believe short-long all the way through here because that's the short form of what the State has to prove under the kidnapping statute before

you can find the defendants herein, that is Gail Robert O'Neal, Lawrence O'Neal, Lloyd G. Allen, Dimple Podborny, guilty of kidnapping of Henry Podborny, you must find that beyond a reasonable doubt that on or about the 29th day of January, 1981, and in Cuyahoga County, Ohio, that the defendant, co-defendants, conspirators, rather aider and abettors, in complicity removed Henry Podborny from the place where he was found or restrained Henry Podborny of his liberty for the purpose of facilitating the commission of a felony or flight thereafter or in the alternative terrorize him or in the alternative to inflict serious physical harm on Henry Podborny and that such acts were accomplished by force, threat or deception.

That's if you find beyond a reasonable doubt in respect to Henry Podborny that he was removed from the place where he was found or restrained from liberty for the purpose of facilitating a felony or flight thereafter, or in the alternative to terrorize or separate, alternate to inflict serious harm to a defendant and that such removal was accomplished either by force, threat of force, deception then the defendants would be guilty of kidnapping under 2905.01.

On the other hand, if the State failed to prove any one of these essential elements of the crime of kidnapping, I repeat it, then you would find them not guilty.

(Tr. 6171-74).

* * *

Therefore, you have to determine these facts from the facts and circumstances in evidence. Whether or not the defendants or co-conspirators or aiders and abettors had

the purpose in mind, either to commit a felony or facilitate the flight from the commission of a felony, or to otherwise have the purpose in mind to terrorize Henry Podborny, or otherwise had the purpose in mind to inflict serious harm on Henry Podborny, such as injury or death.

Now, in conclusion as it relates to kidnapping, if you find every essential element of kidnapping, that is the defendant, co-conspirators or person in concert or aider and abettors, did unlawfully and by force, threat or deception remove Henry Podborny from the place where he was found and restrained him of his liberty for the purpose of facilitating a felony, or flight thereafter, or in the alternative that they did for terrorizing or in the alternative for inflicting serious harm on Henry Podborny and failed to release him, the victim, in a safe place unharmed, then you must find the defendants guilty as charged in the indictment.

(Tr. 6176-77).

* * *

Now, ladies and gentlemen, I have indicated earlier that I would explain what is meant by conspiracy, aiding and abetting and complicity in this case. You will be called upon to decide from the evidence whether or not the State of Ohio has proven a conspiracy beyond a reasonable doubt among the defendants and the other co-conspirators. The Court would appoint [sic] out that the defendants have not been charged in this indictment under our conspiracy statute 2923.01, but have been charged in this particular case, the State of Ohio, theory of the case appears to be buttressed to their aiding and abetting or conspiracy. The central issue of concern is as

follows, one, has the State proven an agreement, a scheme or plan that was participated in by the defendants in this particular case, in a conspiracy intent, the element of the offense, conspiracy, is however more complex because it involved two elements of intent that shade with each other, each party, must have intended to enter into the agreement and scheme and they must have a common intent to commit an unlawful act.

Second issue, factual issue for you is whether or not the State has proven there was a concerted action by and between the defendants, or with other indicted or other unindicted co-conspirators. This you have to determine from the evidence.

Three, whether or not the defendants herein, either or all of them, or some or none of them, have aided or adjoined, aider or abettor, or joined in, in a conspiracy or existing conspiracy. To this extent the Court would indicate that the conspirator rule applies, if four conditions are established, one, that there is an attempt between the parties, two, that the particular defendants participation in the conspiracy, that is the defendants intended to commit and engage in criminal activity and, three, that the particular defendants participation was performed during the course of the conspiracy and, four, that the particular defendants participation was inference of the conspiracy, that is, there was a substantial overt act committed in furtherance of an illegal purpose.

Now, you should consider further whether or not the State has proven that each one of these defendants, that is Robert O'Neal, Lloyd B. Allen and Dimple Podborny, engaged in a conspiracy by committing an overt act in

furtherance of an agreement between them, with the Court now defines and tells you what an overt substantially – tells you about that.

What is a substantial overt act in furtherance of a conspiracy? An overt act is substantially when it is of such character as to manifest a purpose on the part of the actor, in this case, the defendants, that is any of these defendants, that the objective of the conspiracy should be completed. Conspiracy, ladies and gentlemen, is the plan or aiding in or planning with other, or agreeing with another person that one or more of them will engage in a conduct with the purpose to commit or facilitate and/or promote the commission of a specific offense.

Therefore, a conspiracy is an undertaking or an agreement by one or more persons to carry out a common objective to commit, promote, or to facilitate a criminal act.

The existence of undertaking or agreement may be shown either by that direct evidence or by inferences from facts or circumstances in evidence, that is circumstantial evidence. Now the reason for the use of facts and circumstances and inferences, probably has been gathered from the facts that conspirators usually and generally are not open. And conspirators usually don't meet in one place and at one time.

There are various stages of a crime. There is a planning stage, there is a perpetrator who may require him before the crime to assist in planning it during the course of the crime until activity to aid in the commission of it, or in escaping from the scene, or after the defendants completed it or conceal or assist in evading answers, or

protect or concealment of loot and the evidence against them.

Therefore, conspiracies are not really easily identifiable and hence the use of inferences and circumstantial evidence is allowed. Those who associate to perform the criminal act or know or share the objective and participate to some extent are bound by the acts of anyone, any one of their number, in carrying out the purpose of the conspiracy.

You may not consider the acts and statements of anyone against another unless the existence of the agreement and understanding to commit the criminal act is substantiated by the state beyond a reasonable doubt. The defendant cannot be convicted of a conspiracy unless substantial overact [sic] in the furtherance of the conspiracy is proved that – pardon me. Is proved to have been done by he or she, or by a person with whom he or she conspired and that such act was performed subsequent to the defendant's entrance into the conspiracy.

An overt act is substantial when it is of such character to manifest the purpose on the part of the actor, that is, the defendant, that the object of the conspiracy can be completed.

As to unidentified co-conspirators, or co-confidants, the Court would indicate that if the defendants know, or had reasonable cause to believe that a person with whom he or she converses, or has also conspired or was conspired with another person to commit the same offense, then that defendant is guilty of conspiring with such other person who's either co-conspirator or aider and abettor even though the identity of the other person was

unknown to the defendants O'Neal and Allen and Podborny.

Ladies and gentlemen, a co-conspiracy terminates when the offense or offenses are committed, or when it is abandoned by all conspirators. A conspiracy remains in existence during such a period as the conspirators are concerned with the concealment of their criminal conduct as I have indicated earlier, as the testimony of the conspirator. The law of the State of Ohio is that no person shall be convicted on a conspirator's testimony unsupported by other evidence.

The Court will speak further on this matter at length.

The Court has mentioned the word complicity. Conspiracy and complicity are two separate and distinct legal theories.

Also complicity a person who aids or abets in conspiracy can be a co-conspirator, complicity in law means the conduct of one who purposely participates with another as a partner or accomplice for the purpose of committing a crime. The law in Ohio on aiding and abetting or complicity is that a person who knowingly aids or assists another in the commission of a crime is just a guilty as if he personally performed every act constituting the crime.

I'm speaking of aiding and abetting now. When two or more principals have a common purpose to commit a crime and one does one part and the second performs the other part, those acting together are equally guilty of the crime.

Further, where two or more persons have a common purpose to commit a crime and wherein a continuing sequence over events other crimes are committed, all of the persons are responsible for all of the crimes that happen in the continuous sequence of the events even though all of said persons were not physically present when the other crimes were committed.

This is the law in aiding and abetting or in complicity.

The mere fact that a person, as the same law, as aiding and abetting, the mere fact that a person is present when a criminal act is presented does not make him an aider and abettor unless he does some overt act in furtherance of the crime charged in the indictment.

Now, such persons under the law of complicity as distinguished from co-conspirators, such persons are regarded as if they were the principal offender and are just as guilty as if he or she performed each act constituting the offense. This is true even though they weren't physically present when the act was performed.

It is the law of Ohio when two or three persons have a common purpose to commit a crime and one does a part and second does another act, together those acting together with the purpose required for the commission of a crime, that is the purpose required for aggravated murder, aggravated robbery and kidnapping as it relates in this case, are equally guilty of the crime. And the Court instructs you as a matter of law in Ohio that an aider and abettor can be also found as to be a co-conspirator.

The Court has instructed you as to the offense of aggravated murder, aggravated robbery and kidnapping. Further – period. Okay.

Further you will decide whether or not in this case the defendants assisted, or encouraged or directed or associated themselves with one another for the purpose of committing those offenses respectfully by, or consideration of the evidence.

Again, once again a person cannot be convicted – rather, no person can be convicted of these offenses, aiding and abetting, solely on the testimony of conspirators, solely on the testimony of accomplices unsupported by other evidence.

The Ohio Rules require even in conspiracy as well as the declarant that the defendants participation must be established upon independent proof of the conspiracy, such corroboration must come from evidence in the case aside from the testimony of her co-conspirators.

This consideration applies even with regard to the proof of the existence of the alleged conspiracy.

Corroborative evidence is evidence of some act of fact related to the offense, which if believed by itself and without any aid, interpretation or direction from the testimony of a co-conspirator then connects the defendant to the commission of the offense charged. It is not, however, necessary that the corroborative evidence be such in itself to establish every element of the offense charged now, and that it corroborate every fact to which a co-conspirator testifies.

Mere similarity of conduct among the various persons and the fact that they have been associated with

each other and may have assembled together and discussed common aims and interest does not necessarily establish proof of the existence of the conspiracy. However, in this case the evidence in this case need not show that the member of the conspiracy entered into any express or formal agreement, or that they directly by words spoken, or in writing, stated between themselves with the objective or purpose was to be, or details thereof, or expressed means by which the means of the objective or purpose was to be accomplished.

What the evidence in this case must show though beyond a reasonable doubt in order to establish proof that a conspiracy existed, is that the member of the conspiracy in some way or manner and through some contrivance positively, or tacitly, orally, written, expressly or impliedly, confederated, together, combined and agreed, that is, came to a mutual understanding to try to accomplish a common and unlawful crime.

The evidence in this case must establish beyond a reasonable doubt that the alleged conspiracy was purposely formed and each defendant here and purposely joined and participated in the plan intended in advance and further some object or some conspiracy in which one may become a member of a conspiracy without full knowledge of the detail to have a conspiracy.

On the other hand, a person who has not knowledge of the conspiracy, but has to ac [sic] tin [sic] a way which further some object or purpose of the conspiracy, thus not thereby become a conspirator. To act or participate purposely means to act or participate voluntarily and intentionally in an unlawful enterprise and with the special

intent to do something that the law forbids because of a certain unlawful result which was the subject of the agreement.

Thus, if any of the defendants purposely agreed to enter into a conspiracy, or joint venture to accomplish an unlawful objective, if you find that such defendants were co-conspirators or aider and abettors in complicity and in a substantial overt act in furtherance of an alleged conspiracy is proven beyond a reasonable doubt to have been done by this person, by him or her, and/or by a person or by a person with whom he conspires and that such act was performed subsequent to the entry of the defendant into the conspiracy, such defendant properly should be considered a co-conspirator.

An overt act is substantially once again, when it is of such a character as to show a purpose on the part of the actor that the object of the conspiracy should be completed. An overt act is any act purposely committed by one of the conspirators, or co-conspirators an effort to accomplish some objective or purpose of the conspirator – conspiracy. An overt act need not be criminal in nature if conspired separately and apart from the conspiracy. It may be an act which taken alone by itself is innocent. It must, however, be an act which follows, intents towards the accomplishment of the plan or scheme. It must be purposely done in furtherance of some object or purpose of the conspiracy.

If it is established beyond a reasonable doubt that a conspiracy existed in this case, an act, a declaration, then the acts and declarations of any of the co-conspirators are chargeable against any – are chargeable against and may

be considered with respect to each other co-conspirator with respect to each other co-conspirator as though the act of declaration was such – was made by co-conspirator – strike that – the word I think I have – Let's take that over.

If it is established beyond a reasonable doubt that a conspiracy existed, the act or declaration of a co-conspirator are chargeable against and may be considered with respect to each of the co-conspirators as though it was the act or declaration of such co-conspirators. Each co-conspirator act as an agent of the other.

The defendant cannot be bound by the acts or declarations of the other participant until it is established beyond a reasonable doubt that the conspiracy existed and that he was one of the members of the conspiracy.

Now, ladies and gentlemen, in conclusion the Court in summary would indicate that where two or more persons are associated in the same illegal purpose, any act or decision made by one of them with reference to the common objective and done, or said during the life of the conspiracy, may be given in evidence even where the indictment does not charge a conspiracy as such. A conspirator in effect is an agent for each of the other co-conspirators during the life of the conspiracy and as such any statements made or acts done by him in furtherance of the general plan and during the life of the conspiracy is admissible against the co-conspirator. And such declarations may also be testified by such person. And this is an exception to the so-called hearsay rule. It is not necessary that the conspirator be the one that commit the identical offense charged in the indictment or even a

similar one. It is enough that the offense charged in the indictment was one that might have been contemplated as a result of the conspiracy.

And I made reference, when I started in the defining of purpose, I explained that during that course of defining purpose.

Finally, the Court would indicate that when an offender knows or has reason to believe, reasonable cause to believe to be with a person with whom he conspired and is also conspired with another to commit the same offense, the offender is guilty of conspiring with such person even though that person's identity may be unknown to the offender.

Where two or more people enter into execution of a common criminal enterprise, what each does in the execution of the common purpose is the act of all, and if another crime is committed by one of them in attempting to accomplish the common criminal purpose, any one of them the aider and abettor in conspiracy with each other is guilty of the crime with the one who did the act if such crime was committed to accomplish common criminal purpose during the – in furtherance during the time of the conspiracy. This is the law of Ohio.

These are matters, ladies and gentlemen, concerning aiding and abetting and conspiracy that you may consider and you may arrive at out of the evidence before you.

Now, before you can render a verdict of guilty on the main charges herein, that is aggravated murder, robbery – aggravated robbery, and kidnapping, you must decide

from the evidence beyond a reasonable doubt that the defendants either entered into a conspiracy as defined 'o you at length here, or in the alternative found to be aiders or abettors in complicity as found here, or have individually been proven guilty beyond a reasonable doubt by the State of Ohio of the charges before this Court, that is, aggravated murder, aggravated robbery, and kidnapping.

On the other hand, if the State failed to prove any one of the essential elements of those three crimes, statutory crimes, these defendants should be found not guilty.

Now, ladies and gentlemen, once again I will repeat in this particular case we have multiple counts and multiple persons being charged. If you find that the State has proven beyond a reasonable doubt all of the essential elements of any one or more of the crimes charged in the various counts of the indictment, then your verdict must be guilty as to such crime or crimes according to your finding. If you find, on the other hand, that the State has failed to prove beyond a reasonable doubt any one of the essential elements, or any one or more of the crimes charged in the separate count of the indictment, then your verdict must be not guilty.

Once again, the charges as set forth in each count and the charges constitute separate and distinct matter, you must consider each count and the evidence applicable to each count separately and you must consider and separate your finding to each count uninfluenced by your verdict as to the other counts and other defendants. Each defendant may be guilty or not guilty, not guilty or guilty, of any one or all of the crimes charged.

As to the counts, you have multiple counts and you must decide as to the guilt and innocence of each one of these three defendants here as if they were tried separately and if you cannot agree on a verdict as to each – all of the defendants, or you agree as to one or more, you must render your verdict as to that one or more whose guilt you agree on, or innocence you agree on. And you must separately consider the evidence applicable to each of the defendants as though there were three separate trials and consider your finding as to each defendant uninfluenced by your verdict as to the other defendant.

(Tr. 6177-95).

-END-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,

Petitioner

v.

TERRY L. MORRIS,

Respondent

C-1-86-976

(Filed April 15, 1992)

ORDER

This matter was referred pursuant to 28 U.S.C. § 636 to the United States Magistrate Judge for Report and Recommendation on the Petition for Writ of Habeas Corpus filed by the petitioner pursuant to 28 U.S.C. § 2254. The matter is before the Court upon the Report and Recommendation of the Magistrate Judge (doc. no. 68) recommending that the Petition for Writ of Habeas Corpus be denied as to certain claims and granted as to certain claims; upon respondent's objections thereto (doc. no. 69), which were not timely filed; petitioner's Motion to Strike Objection (doc. no. 70); petitioner's response to respondent's objections (doc. no. 71); and petitioner's motion for Bail and Suspension of Execution of Sentence (doc. no. 72).

The respondent failed to file his objections in a timely fashion and failed to serve the petitioner with a Motion for Extension to File Objections.

The respondent has not responded to the petitioner's Motion to Strike the Objections of the Respondent.

Upon careful consideration of the matters before the Court, and upon conducting a *de novo* review of the record, the Court finds that the Magistrate Judge's conclusion that petitioner's convictions are supported by substantial but not overwhelming evidence should be adopted (doc. no. 68, p. 47).

Accordingly, the Court accepts the factual findings of the Magistrate Judge and hereby **ADOPTS IN PART AND INCORPORATES** into this Order by reference his Report and Recommendation dated January 22, 1992 that O'Neal's Petition for Writ of Habeas Corpus be **DENIED** as to the following:

(a) O'Neal's claim that he should not have been tried with his co-defendants;

(b) O'Neal's challenge to the racial composition of the jury.

As to O'Neal's Petition for Writ of Habeas Corpus based on the claim of constitutionally defective jury instructions and the claim that prosecutorial misconduct and erroneously admitted evidence deprived O'Neal of the fundamentally fair trial, the Petition for Writ of Habeas Corpus in **RECOMMITTED** to the Magistrate Judge for reconsideration in light of the doctrine espoused in *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946), and the cases spawned by it as they may relate to these claims. The Court incorporates herein by reference § 3.10, Pattern Criminal Jury Instructions of the Sixth Circuit (1991) and the commentary thereunder, a copy of which is attached. This Court holds that these federal instructions fulfill the requirements of federal due process. The theory of law they represent may impact upon

the conclusion of the Report and Recommendation, because the Magistrate Judge found in the record substantial evidence supporting the guilt of the petitioner.

In light of the above, the Court further **ORDERS** that petitioner's Motion for Bail and Suspension of Execution of Sentence (doc. no. 72) is **REFERRED** to the Magistrate Judge pursuant to Rule 10, Rules Governing Section 2244 Cases in the United States District Courts, and 28 U.S. C. § 636(b); and petitioner's Motion to Strike Objection (doc. no. 70) is **GRANTED,** since respondent failed to respond to the Motion to Strike, failed to file timely objections, and failed to file a timely motion for an extension of time in which to file objections to the Report and Recommendation.

IT IS SO ORDERED.

/s/ H J Weber
Herman J. Weber, Judge
United States District Court

3.10

PINKERTON LIABILITY FOR SUBSTANTIVE OFFENSES COMMITTED BY OTHERS

(1) Count ___ of the indictment accuses the defendants of committing the crime of _____.

(2) There are two ways that the government can prove the defendants guilty of this crime. The first is by convincing you that they personally committed or participated in this crime. The second is based on the legal rule

that all members of a conspiracy are responsible for acts committed by the other members, as long as those acts are committed to help advance the conspiracy, and are within the reasonably foreseeable scope of the agreement.

(3) In other words, under certain circumstances, the act of one conspirator may be treated as the act of all. This means that all the conspirators may be convicted of a crime committed by only one of them, even though they did not all personally participate in that crime themselves.

(4) But for you to find any one of the defendants guilty of _____ based on this legal rule, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant was a member of the conspiracy charged in Count ____ of the indictment.

(B) Second, that after he joined the conspiracy, and while he was still a member of it, one or more of the other members committed the crime of _____.

(C) Third, that this crime was committed to help advance the conspiracy.

(D) And fourth, that this crime was within the reasonably foreseeable scope of the unlawful project. The crime must have been one that the defendant could have reasonably anticipated as a necessary or natural consequence of the agreement.

(5) This does not require proof that each defendant specifically agreed or knew that the crime would be committed. But the government must prove that the

crime was within the reasonable contemplation of the persons who participated in the conspiracy. No defendant is responsible for the acts of others that go beyond the fair scope of the agreement as the defendant understood it.

(6) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of them, then the legal rule that the act of one conspirator is the act of all would not apply.

Use note

This instruction should be used when the government is attempting to convict a defendant of a substantive crime committed by other members of a conspiracy, and there is also some evidence that the defendant personally committed or participated in the commission of the substantive offense.

The language in paragraph (2) should be modified to delete all references to personal commission or participation when only one defendant is on trial and there is no evidence that he personally committed or participated in the commission of the substantive offense.

When more than one defendant is on trial, and there is no evidence that one or more defendants personally participated in the substantive offense, paragraph (2) should be modified to identify which defendants could be convicted on a personal participation theory, and which defendants could not.

Committee Commentary 3.10

This instruction is designed for use when there is some evidence that would support a conviction based on a co-conspirator liability theory, and some evidence that a defendant personally committed or participated in a substantive offense.

In *Pinkerton v. United States*, 328 U.S. 640, 645-648, 66 S.Ct. 1180, 1183-1185, 90 L.Ed. 1489 (1946), the Supreme Court held that even though there was no evidence that one of two conspirators participated directly in the commission of the substantive offenses charged in the indictment, that conspirator could still be convicted of the substantive offenses based on the principle that the "act of one partner [committed in furtherance of the conspiracy] may be the act of all." Accord *United States v. Martin*, 920 F.2d 345, 348 (6th Cir.1990) ("The *Pinkerton* doctrine permits conviction of a conspirator for the substantive offenses of other conspirators committed during and in furtherance of the conspiracy.") *United States v. Adamo*, 742 F.2d 927, 943-944 (6th Cir. 1984) ("Once a person becomes a member of a conspiracy, he or she may 'be held responsible for all that may be . . . done' by co-conspirators."), cert. denied, 469 U.S. 1193, 105 S.Ct. 971, 83 L.Ed.2d 975 (1985); *United States v. Chambers*, 382 F.2d 910, 914 (6th Cir.1967)) ("Where the substantive offense is committed by one or more conspirators in furtherance of an unlawful activity, all members of the conspiracy are guilty of the substantive offense.").

The instruction requires the prosecution to prove that the substantive offense was committed after the defendant joined the conspiracy, and while he was still a member of it. Although there is some authority for the proposition that a person who joins a conspiracy may be held responsible for acts committed before he joined it, see, e.g., *United States v. Cimini*, 428 F.2d 129, 130 (6th Cir.), cert. denied, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970), that authority is questionable in light of the United States Supreme Court's decision in *Levine v. United States*, 383 U.S. 265, 266-267, 86 S.Ct. 925, 925-926 15 L.Ed.2d 737 (1966). In *Levine*, the Supreme Court accepted the Solicitor General's concession that an individual "cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy."

The Supreme Court has indicated that it would not hold co-conspirators liable for a substantive offense committed by other members of the conspiracy if the substantive offense "was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of . . . the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Pinkerton, supra*, 328 U.S. at 647-648, 66 S.Ct. at 1184-1185. In *United States v. Etheridge*, 424 F.2d 951, 965 (6th Cir.1970), cert. denied, 400 U.S. 1000, 91 S.Ct. 464, 27 L.Ed.2d 452 (1971), the Sixth Circuit treated this statement from *Pinkerton* as creating three separate limitations on the rule that the act of one co-conspirator is the act of all, and Instruction 3.10 does the same. *Cf. United States v. Frost*, 914 F.2d 756, 762

(6th Cir.1990) ("[A] court need not inquire into the individual culpability of a particular conspirator, so long as the substantive crime was a reasonably foreseeable consequence of the conspiracy.")

In *Pinkerton*, the Supreme Court stated that the act of one co-conspirator may be the act of all "without any new agreement specifically directed to that act." *Id.*, 328 U.S. at 646-647, 66 S.Ct. at 1183-1184. And in *Etheridge*, the Sixth Circuit held that even though a defendant had no knowledge of a particular substantive offense, he could still be convicted of that offense if it was "within the reasonable contemplation of those who formulated and participated" in the conspiracy. *Id.* 424 F.2d at 965.

In *United States v. Borelli*, 336 F.2d 376, 385-386 (2d Cir. 1964), cert. denied, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965), the Second Circuit held that when the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance to the case, a special instruction should be given focusing the jury's attention on this issue. Quoting from *United States v. Peoni*, 100 F.2d 401, 403 (2d Cir.1938), the Second Circuit stated that "[n]obody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it". See also *United States v. United States Gypsum Co.*, 438 U.S. 422, 463 n. 36, 98 S.Ct. 2865, 2886 n. 36, 57 L.Ed.2d 854 (1978) (quoting a similar requested instruction, and stating that the district court's actual instructions differed in only "minor and immaterial" respects).

When only a single defendant is on trial and there is no evidence that he personally committed or participated

in the commission of the substantive offense, the language in paragraph (2) should be modified to delete all references to personal commission or participation.

When more than one defendant is on trial, and there is no evidence that one or more defendants personally participated in the substantive offense, paragraph (2) should be modified to identify which defendants could be convicted on a personal participation theory, and which defendants could not.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,

Petitioner

vs.

CASE NO.
C-1-86-0976

TERRY MORRIS,

Respondent

NOTICE

Attached hereto is the Supplemental Report and Recommended Decision of the Honorable Robert A. Steinberg, United States Magistrate Judge, which was filed on May 11, 1992. Any party may object to the Magistrate Judge's findings, recommendations and report within ten (10) days after being served with a copy thereof or further appeal is waived. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Such parties shall file with the Clerk of Court, and serve on all parties, the Judge and the Magistrate Judge, a written Motion to Review which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made, along with a memorandum of law setting forth the basis for such objection. (Such parties shall file with the Clerk a transcript of the specific portions of any evidentiary proceedings to which an objection is made).

In the event a party files a Motion to Review the Magistrate Judge's Findings, Recommendations and Report, all other parties shall respond to said Motion to

Review within ten (10) days after being served a copy thereof.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
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ROBERT O'NEAL,

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Case No.
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Respondent

SUPPLEMENTAL REPORT AND RECOMMENDATION

Petitioner Robert Neal, a prisoner at the Chillicothe Correctional Institute in Chillicothe, Ohio, filed this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On January 22, 1992, we issued a report and recommendation recommending that the petition be denied with respect to two of O'Neal's claims for habeas corpus relief and granted with respect to his claims that jury instructions were constitutionally defective and that prosecutorial misconduct and erroneously admitted evidence deprived him of a fundamentally fair trial. (Doc. 68).

On April 15, 1992, the district court judge issued an order adopting the portion of the report and recommendation recommending denial of two of O'Neal's claims for habeas corpus relief. (Doc. 73). The Court also adopted our conclusion that "petitioner's convictions are supported by substantial but not overwhelming evidence." *Id.* at 2. However, the Court ordered the petition recommitted to the undersigned Magistrate Judge for reconsideration of O'Neal's claims of constitutionally defective jury instructions and that he was deprived of a fair trial because of prosecutorial misconduct and erroneously admitted evidence "in light of the doctrine espoused in *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946), and the cases spawned by it as they may relate to these claims." *Id.* The Court further stated:

> The Court incorporates herein by reference § 3.10, Pattern Criminal Jury Instructions of the Sixth Circuit (1991) and the commentary thereunder. . . . This Court holds that these federal instructions fulfill the requirements of federal due process. The theory of law they represent may impact upon the conclusion of the Report and Recommendation, because the Magistrate Judge found in the record substantial evidence supporting the guilt of the petitioner.

Id. at 2-3.

The *Pinkerton* doctrine relates to O'Neal's claim that the jury instructions wre constitutionally defective because they relieved the State of its burden of proving beyond a reasonable doubt the intent element for each offense charged. In our previous report and recommendations, we found that the instructions were confusing

because they failed to set forth the state law requirement that each defendant have the independent intent to commit the offenses charged in order to be found guilty. (Doc. 68, p. 21). We concluded that the erroneous instructions constituted a due process violation because a reasonable juror could have interpreted them to mean that a finding of intent on the part of one co-conspirator would be sufficient to establish the requisite intent of other participants in the alleged conspiracy. *Id.* at 24.

In *Pinkerton*, the Supreme Court held that a defendant can be convicted of the substantive offenses charged against him, even though there is no evidence to show that he participated directly in the commission of the offenses, if it is found that he was a party to an unlawful conspiracy at the time the offenses were committed and the offenses charged were in fact committed in furtherance of the conspiracy. 328 U.S. at 645-47. The Court reasoned:

> Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy. Yet all members are responsible, though only one did the mailing. The governing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project. The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which

> holds responsible one who counsel, procures, or commands another to commit a crime is founded on the same principle.

Id. at 647 (citations omitted). The Court refused to extend its holding to situations where the substantive offense committed by a co-conspirator "was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Id.* at 647-48.

Section 3.10 of the Sixth Circuit's Pattern Criminal Jury Instructions is based on the *Pinkerton* case. Under this section, a defendant can be found guilty of substantive offenses committed by others if the government proves beyond a reasonable doubt that the defendant was a member of an unlawful conspiracy; that while he was a member of the conspiracy, one or more of the other members committed the substantive offense; that the offense was committed to help advance the conspiracy; and that the offense was within the reasonably foreseeable scope of the conspiracy. The instruction provides: "This does not require proof that each defendant specifically agreed or knew that the crime would be committed. But the government must prove that the crime was within the reasonable contemplation of the persons who participated in the conspiracy. No defendant is responsible for the acts of others that go beyond the fair scope of the agreement as the defendant understands it."

Under Ohio's complicity statute, which provides the statutory basis for the charges against O'Neal on the theory of his participation as an accomplice or co-conspirator, aiders

and abettors and co-conspirators must have the culpable mental state required for the commission of the principal offense. Ohio Rev. Code § 2923.03(A); *see also State v. Lockett*, 49 Ohio St. 2d 48, 60 (1976), *rev'd on other grounds*, 438 U.S. 586 (1978). In Ohio, a defendant cannot be convicted of aggravated murder solely because he engaged in a felony that resulted in a murder; rather, the prosecution must prove a defendant's purpose to kill as an essential element of the offense even in cases where it proceeds on a complicity theory. *State v. Scott*, 61 Ohio St. 2d 155, 166 (1980); *see also Clark v. Jago*, 676 F.2d 1099, 1103-04 (6th Cir. 1982), *cert. denied*, 466 U.S. 977 (1984). The prosecution may prove intent to kill either by producing direct evidence of intent or by showing that the participants in a felony entered into a common plan and the aider and abettor or co-conspirator knew either that a dangerous instrumentality was to be employed to accomplish the felony or that the felony and the manner of its accomplishment was reasonably likely to produce death. *Scott*, 61 Ohio St. 2d at 165; *Lockett*, 49 Ohio St. 2d at 59-60. As in *Pinkerton*, this means that under Ohio law intent to kill can be inferred from the existence of a criminal conspiracy where a homicide could reasonably be foreseen as a natural consequence arising from the furtherance of the conspiracy. *See Lockett*, 49 Ohio St. 2d at 60-62. For example, evidence that a defendant participated in the planning and commission of an armed robbery, where it is reasonably foreseeable that the victim's life would be endangered, is sufficient to establish intent to kill. *Lockett*, 49 Ohio St. 2d at 62. On the other hand, a jury instruction which would permit a defendant to be found guilty of aiding and abetting a murder solely based on evidence that he was implicated in the victim's kidnapping improperly relieves the State of its

burden of proving intent to kill. *Scott*, 61 Ohio St. 2d at 166-67.

In this case, the jury instructions on the intent element of the offenses charged and the complicity theory of liability were so confusing and vague that a reasonable juror could have interpreted them to mean that the intent of one co-conspirator could be imputed to O'Neal as a participant in a conspiracy, even if the offense was not within the reasonably foreseeable scope of that conspiracy as required under *Pinkerton* and Ohio case law. In instructing the jury on the intent element of the substantive offenses of aggravated murder, kidnapping and aggravated robbery, the court often referred to "the defendants or co-conspirators or aiders and abettors" as a group, without explicitly setting forth the intent required of each defendant individually either as a direct participant in the offense or as a participant in a conspiracy. (*See* Doc. 68, App. A, pp. 2, 5, 8). In addition, the court never instructed the jury that in order to find the individual defendants guilty of the substantive offenses under a conspiracy or complicity theory, it had to find that the offenses could reasonably be foreseen as necessary or natural consequences of the conspiracy. *See id.* at 9, 14, 16. Indeed, the court instructed the jury on conspiracy and complicity only in general terms, without discussing the separate offenses charged or the scope of the conspiracy alleged against defendants. *See id.* at 8-16.

Therefore, without further explanation, a reasonable juror could have concluded that O'Neal could be found guilty of the crimes of kidnapping, robbery and murder simply based on his participation in a conspiracy to obtain money from either Mrs. or Mr. Podborny that

eventually led to the commission of the offenses. Also, a reasonable juror could have interpreted the instructions to mean that if O'Neal were found to be a member of a kidnapping conspiracy, he could be found guilty of aggravated murder resulting from the kidnapping even if the murder was not within the reasonable contemplation of the participants in the kidnapping scheme. *Cf. Scott*, 61 Ohio St. 2d at 166-67.

The instructions as a whole were insufficient to dispel the possibility of juror confusion. When instructing on the intent element of aggravated murder, the court stated on one occasion:

> Wherein the evidence may disclose the existence of complicity by way of an aider and abettor or a conspiracy, the law of the state of Ohio is as follows: . . . where you have an unlawful act contemplated in the original conspiracy, although not identical with or similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was performed was reasonable [sic] or likely to produce the death of another, then each conspirator, or aider and abettor is equally guilty as the principal offender of the homicide.

(Doc. 68, App. A, p. 2). This instruction, which was repeated to the jury when it requested a "brief definition of aggravated murder" during its deliberations, properly sets forth an appropriate method for inferring an accomplice's or co-conspirator's intent to kill based on his participation in a conspiracy. *See Scott*, 61 Ohio St. 2d at 165; *Lockett*, 49 Ohio St. 2d at 59-60.

However, no such instruction was given regarding the requisite intent of an accomplice or co-conspirator on the other charges of aggravated robbery and kidnapping. Moreover, the instruction was stated in pro-prosecution terms of a finding of a guilt. The court gave no further instructions to emphasize to the jury that before it could find the defendants guilty of aggravated murder based on their participation in a conspiracy, it had to find that the unlawful object of the conspiracy and the manner of its accomplishment was reasonably likely to produce death.

The instructions given on complicity and conspiracy further confused matters because the court never stated that the substantive offense had to be a reasonably foreseeable consequence of the conspiracy before the jury could find the defendants guilty of the offense solely because of their participation in the conspiracy. The court did not list "reasonable foreseeability" as a condition for finding co-conspirator liability. (*See* Doc. 68, App. A, p. 9). Moreover, without mentioning the reasonable foreseeability component, the court stated: "Where two or more people enter into execution of a common criminal enterprise, what each does in the execution of the common purpose is the act of all, and if another crime is committed by one of them in attempting to accomplish the common criminal purpose, any one of them . . . is guilty of the crime with the one who did the act if such crime was committed to accomplish common criminal purpose during the – in furtherance during the time of the conspiracy." *Id.* at 16 At one point in these instructions, the court made the vague statement that "[i]t is enough that the offense charged in the indictment was

one that *might* have been contemplated as a result of the conspiracy." *Id.* at 15 (emphasis added).

As discussed in the previous report and recommendation, the risk that the jury could have wrongly interpreted the instructions on intent was substantially increased by the prosecutor's misstatement of the law in his closing remarks, which was effectively endorsed by the trial judge when he overruled defense counsel's objections to the remarks. (*See* Doc. 68, pp. 23-24). The prosecutor's comments improperly suggested to the jury that all that was necessary to establish guilt for the crimes charged was proof "that those accused of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes." (Tr. 6075-76).

Accordingly, the doctrine espoused in *Pinkerton* does not change our conclusion in the previous report and recommendation that the jury instructions on the intent element of the crimes charged constituted a violation of O'Neal's right to due process of law.

In any event, assuming, *Arguendo,* that the jury instructions were not constitutionally defective, we would still recommend a finding that O'Neal was deprived of a fair trial based on the prosecutor's misconduct and the erroneously admitted evidence. We view the prosecutor's misconduct and the admission of inflammatory evidence as far more egregious errors than the confusing jury instructions. As we stated in the previous report and recommendation, "[w]e seriously doubt that O'Neal could have received a fair trial in the emotional atmosphere created by the introduction of unnecessary

and gruesome evidence; the evidence of a prior killing committed by O'Neal where the victim was shot in the head; the prosecutor's inflammatory argument designed to stir the passions of the jurors; and the effective endorsement of such actions by the trial judge through his overruling defense objections, failing to weigh the prejudice of such evidence, and failing to give prompt cautionary instructions." (Doc. 68, p. 42).

The prosecutor's improper conduct in eliciting the details of O'Neal's killing another man was calculated, highly prejudicial and extensive. *See id.* at 30-39. The introduction of gruesome evidence, coupled with the prosecutor's inflammatory remarks regarding such evidence, was also prejudicial and was done for the express purpose of inflaming the jury's passions. *See id.* at 28-30, 39-40. It is likely that these errors, which were effectively endorsed by the trial judge, caused the jury to abandon its impartiality in weighing the evidence. Although the evidence against O'Neal was substantial, it was not overwhelming and there were substantial credibility issues for the jury to resolve. *Id.* at 47-48. Accordingly, we conclude that the prosecutor's misconduct and the erroneous admission of inflammatory evidence taken as a whole and within the context of the entire record, deprived O'Neal of a fundamentally fair trial.

Date: 5-8-92

/s/ Robert A. Steinberg
Robert A. Steinberg
United States
Magistrate Judge

cbc

United States District Court

SOUTHERN DISTRICT OF OHIO

ROBERT O'NEAL	JUDGMENT IN A CIVIL CASE
V.	
TERRY MORRIS	CASE NUMBER: C-1-86-976

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

(1) Petitioner's motion for bail and suspension of execution of sentence (doc. no. 72) is **DENIED.**

(2) Petitioner's application for a writ of habeas corpus (doc. no. 1) is **CONDITIONALLY GRANTED**. The State of Ohio or the county of Cuyahoga should retry petitioner within ninety (90) days from the date of this Order. Should no further action be taken by the State of Ohio or the County of Cuyahoga, within ninety (90) days of the date of this Order, including retrial of petitioner, the Court **ORDERS** respondent to release petitioner, such release being final and unconditional.

This case is **DISMISSED** and **TERMINATED** on the docket of this Court.

July 27, 1992
Date

KENNETH J. MURPHY
Clerk

/s/ D. A. Myers
(By) Deputy Clerk D. A. Myers

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,

Petitioner

v. C-1-86-976

TERRY MORRIS,

Respondent

ORDER

Petitioner Robert O'Neal brings this action through court-appointed counsel for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner challenges the constitutionality of his convictions by a jury in the Cuyahoga County, Ohio Court of Common Pleas for aggravated murder, kidnapping, and aggravated robbery. This matter is before the Court upon a Report and Recommendation and a Supplemental Report and Recommendation of the Untied States Magistrate Judge (doc. nos. 68, 74), respondent's objection (doc. no. 76), petitioner's response (doc. no. 79), petitioner's motion for bail (doc. no. 72), and a pretrial services report (doc. no. 77).

I.

The Magistrate Judge recommends that this Court issue a writ of habeas corpus on the ground that O'Neal was not provided a fundamentally fair trial due to the constitutionally defective jury instructions, the prosecutor's

prejudicial misconduct, and the admission of certain prejudicial evidence.[1]

Upon a *de novo* review of the record in light of respondent's objections, the Court finds that respondent's contentions have either been adequately addressed and properly disposed of by the Magistrate Judge or present no particularized arguments that warrant specific responses by this Court. The Court finds that the Magistrate Judge accurately set forth the controlling principles of law and properly applied them to the particular facts of this case and agrees with the Magistrate Judge that petitioner was deprived of a fundamentally fair trial in violation of his rights under the Due Process Clause.

Accordingly, the Court hereby **ADOPTS** the Report and Recommendation and the Supplemental Report and Recommendation of the United States Magistrate Judge (doc. nos. 68, 74).

II.

Petitioner seeks an order directing the state to release him on bail and suspend the execution of his sentence (doc. no. 72). He argues that release on bail is proper because the violations of his constitutional rights during

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[1] The Magistrate Judge also recommends that in the event this Court does not adopt these recommendations, this Court should grant a writ of habeas corpus on petitioner's claim that he was deprived of his rights under the Due Process Clause during his state appeal of his convictions. Given this Court's agreement with the Magistrate Judge's primary conclusions, there is no need to reach petitioner's claim that he was deprived of due process during his state appeal.

his trial are substantial meritorious claims of law that warrant a new trial. Petitioner asserts that the following exceptional circumstances justify release on bail: He is sixty-one years of age; he has served over eleven years on the sentences imposed in this case; he filed the present habeas corpus action over five and one-half years ago; he is factually innocent of the crimes, as demonstrated by the trial record and as supported by certain testimony during the evidentiary hearing held by the Magistrate Judge; he has substantial business and family ties to the Cleveland area, and; he has numerous friends in Cleveland.

Respondent, remarkably, has not filed a response to petitioner's motion for bail.

The factors pertinent to determining whether a successful habeas corpus petitioner is entitled to bail or bond pending appeal are set forth in *Workman v. Tate*, 958 F.2d 164, 166 (6th Cir. 1992); *see also* Fed. R. App. P. 23. Weighing the factors in light of the specific circumstances of this case, this Court finds that petitioner's release on bail is not warranted at this time. The factors weighing against releasing petitioner on bond pending his appeal include the fact that petitioner has placed himself in positions where acts of violence have occurred, he stands accused of committing three violent felony offenses upon which there exists "substantial" evidence (doc. no. 68, p. 47) of his guilt, the Federal Pretrial Services Report recommends that his motion for bond be denied, and the State of Ohio's interest in continuing petitioner's rehabilitation and ensuring public safety. *See Workman*, 958 F.2d at 166. Since these significant factors outweigh the harm petitioner may incur by remaining incarcerated

pending his new trial, his motion for bail is not well taken at this time. *Cf. id.*

ORDER

This Court hereby **ORDERS** that:

(1) Petitioner's motion for bail and suspension of execution of sentence (doc. no. 72) is **DENIED.**

(2) Petitioner's application for a writ of habeas corpus (doc. no. 1) is **CONDITIONALLY GRANTED.** The State of Ohio or the County of Cuyahoga should retry petitioner within ninety (90) days from the date of this Order. Should no further action be taken by the State of Ohio or the County of Cuyahoga, within ninety (90) days of the date of this Order, including retrial of petitioner, the Court **ORDERS** respondent to release petitioner, such release being final and unconditional.

IT IS SO ORDERED.

/s/ H. J. Weber
Herman J. Weber, Judge
United States District Court

United States Court of Appeals
Sixth Circuit.

Robert O'NEAL, Petitioner-Appellee,
v.
Terry L. MORRIS, Respondent-Appellant.
No. 92-3763.

Argued May 6, 1993.
Decided Aug. 20, 1993.

Rehearing and Suggestion for Rehearing
En Banc Denied Oct. 4, 1993.

State prisoner convicted of aggravated murder, aggravated robbery, and kidnapping petitioner for writ of habeas corpus. The United States District Court for the Southern District of Ohio, Herman J. Weber, J., granted the writ, and state appealed. The Court of Appeals, Alan E. Norris, Circuit Judge, held that: (1) state's failure to filed timely objections to magistrate's first report did not preclude its appeal, and (2) any error in jury instructions and prosecutor's closing argument pertaining to intent of conspirators or aiders and abettors was harmless, where all evidence upon which jury could have relied to establish petitioner's guilt pointed to his guilt as a principal.

Reversed.

Thomas R. Wetterer, Jr. (argued & briefed), Public Defender's Office, Columbus, OH, for petitioner-appellee.

Suzanne E. Mohr (argued & briefed), Office of the Atty. Gen. of Ohio, Columbus, OH, for respondent-appellant.

Before: MILBURN, RYAN, and NORRIS, Circuit Judges.

ALAN E. NORRIS, Circuit Judge.

The state of Ohio, on behalf of warden Terry L. Morris of the Chillicothe Correctional Institute, appeals the district court's order which conditionally granted a writ of habeas corpus on the basis that improper jury instructions and other trial errors rendered petitioner Robert O'Neal's state murder trial fundamentally unfair. We reverse.

I.

In 1981 petitioner was convicted by an Ohio jury of aggravated murder, aggravated robbery, and kidnapping in connection with the death of Henry Podborny. In January 1981 Podborny's estranged wife, Dimple, lured him from his home near Chicago on the pretense that she wished to resolve their marital difficulties. Three months later, authorities discovered Mr. Podborny's corpse in a field in Cleveland.

The evidence at trial revealed a detailed conspiracy among at least six individuals, including Dimple Podborny, her daughter-in-law, and acquaintances, to kidnap, rob, and murder Henry Podborny. The conspirators considered a number of plots, but eventually decided to have Dimple induce her husband to fly to Cleveland. Petitioner would then kidnap and hold him in the basement of an unlicensed saloon petitioner operated, while others would rob Mr. Podborny's residence and business.

On January 29, 1981, Mr. Podborny flew to the Cleveland airport, where Dimple's daughter-in-law, Lola Toney, met him and escorted him to petitioner's saloon. Minutes after Mr. Podborny entered, petitioner exited the bar and handed to Toney Podborny's wallet and other possessions. Soon after, another conspirator, Lloyd Allen, emerged from the bar and informed petitioner and Toney that he had struck Podborny with a pipe.

From January through March, Dimple, Toney, and others engaged in a variety of schemes to make it appear that Mr. Podborny was traveling on business, while they attempted to obtain his money. By late March, Toney believed Henry Podborny was no longer alive. His corpse was discovered a month later. Coroners determined that he had been struck at least five times in the head and shot once in the forehead. Petitioner, Dimple Podborny, Lola Toney, Lloyd Allen, and two others were subsequently indicted for aggravated murder, aggravated robbery, and kidnapping. After the case against three of the conspirators was resolved by a trial and a guilty plea, petitioner, Lloyd Allen, and Dimple Podborny were tried jointly and convicted on all counts. Petitioner unsuccessfully appealed his conviction to the Ohio Court of Appeals and Ohio Supreme Court.

In 1986, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court ruled that petitioner's trial had been fundamentally unfair and conditionally granted the writ. The state filed this timely appeal.

II.

Petitioner first argues that this court should not hear the state's appeal because the state's objections to the magistrate's first report, which recommended that the writ issue, were filed approximately twenty days late. *See* 28 U.S.C. § 636(b)(1) (setting ten-day deadline for objections to magistrate's report). This court held in *United States v. Walters*, 638 F.2d 947 (6th Cir.1981), that a party's failure to file timely objections to a magistrate's report waives that party's right to appeal from the district court's decision to adopt the magistrate's report. *Id.* at 949-50. *See also Thomas v. Arn*, 474 U.S. 140, 142, 106 S.Ct. 466, 468, 88 L.Ed.2d 435 (1985) (approving *Walters* rule).

While the district court agreed to strike the state's untimely objections, it declined to adopt the magistrate's entire report. Instead, the court recommitted the case to the magistrate for further consideration. After reconsideration, the magistrate issued a second report, again recommending that the court grant the writ and incorporating much of the reasoning articulated in the first report. The state filed timely objections to the second report, which the district court considered.

It is well established that the *Walters* rule is procedural, not jurisdictional, and that this court may excuse the default in the interests of justice. *Thomas*, 474 U.S. at 155, 106 S.Ct. at 475; *Kent v. Johnson*, 821 F.2d 1220, 1222-23 (6th Cir.), *amended on other grounds* (6th Cir.1987). This court has also concluded that when, as here, a district court considers untimely objections, the justifications for enforcing the *Walters* rule dissipate. *Patterson v. Mintzes*, 717 F.2d 284, 286 (6th Cir. 1983). Therefore, given

the unique facts of this case, we conclude it is in the interests of justice to hear the state's appeal of the district court's decision that the writ be granted.

III.

In *Brecht v. Abrahamson*, ___ U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), the Supreme Court recently clarified the standard we must apply on habeas review of state court convictions. If we conclude that a federal constitutional trial error[1] occurred at petitioner's trial, we must ascertain whether the error " 'had substantial and injurious effect or influence in determining the jury's verdict' " such that it resulted in actual prejudice. *Brecht*, ___ U.S. ___, ___, 113 S.Ct. at 1717, 1722 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)). The habeas petitioner bears the burden of establishing such prejudice. *Id.*, ___ U.S. at ___, 113 S.Ct. at 1722.

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[1] A constitutional trial error is one which "occurs during the presentation of the case to the jury, and is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial." *Id.*, ___ U.S. at ___, 113 S.Ct. at 1717 (alterations in original) (citing *Arizona v. Fulminante*, 499 U.S. 279, ___, 111 S.Ct. 1246, 1249, 113 L.Ed.2d 302 (1991)). Such errors contrast with "structural defects in the constitution of the trial mechanism," such as deprivation of the right to counsel, which require automatic reversal because "they infect the entire trial process." *Id.* The Supreme Court recently noted that jury instruction errors quite similar to that alleged here, involving presumptions about an element of the offense, are amenable to harmless-error review. *See Sullivan v. Louisiana*, ___ U.S. ___, ___, 113 S.Ct. 2078, 2082, 124 L.Ed.2d 182 (1993).

In petitioner's case, the district court adopted the magistrate's conclusion that the jury instructions given at petitioner's trial "were so confusing and vague that a reasonable juror could have interpreted them to mean that the intent of one co-conspirator could be imputed to [petitioner]," thereby relieving the state of its burden to prove petitioner's intent to kill beyond a reasonable doubt, in violation of *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), and *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

Initially, we point out that the district court employed an outdated standard for evaluating petitioner's *Sandstrom* claim. The court incorrectly relied upon the test espoused in *Francis v. Franklin*, 471 U.S. 307, 315-16, 105 S.Ct. 1965, 1972, 85 L.Ed.2d 344 (1985), and *Sandstrom*, 442 U.S. at 514, 99 S.Ct. at 2454, and followed by this court in *Clark v. Jago*, 676 F.2d 1099, 1102 (6th Cir.1982), *cert. denied*, 466 U.S. 977, 104 S.Ct. 2360, 80 L.Ed.2d 832 (1984), that jury instructions infringe a defendant's due process rights if a reasonable jury *could have* interpreted the instruction as unconstitutionally shifting the burden of proof. However, after reviewing its sometimes inconsistent articulations of the test, the Supreme Court settled on a single standard of review for jury instructions: " 'whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, ___ U.S. ___, ___ & n. 4, 112 S.Ct. 475, 482 & n. 4, 116 L.Ed.2d 385 (1991) (emphasis added) (quoting *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1197, 108 L.Ed.2d 316 (1990)).

With this standard, we turn to the instructions at issue here. Petitioner was charged with aggravated murder, aggravated robbery, and kidnapping. Under Ohio law, a court may instruct the jury on complicity even though the defendant was charged as a principal. *See* Ohio Rev.Code Ann. § 2923.03(A), (F) (Anderson 1992); *Hill v. Perini*, 788 F.2d 406, 407-08 (6th Cir.) (discussing the practice and holding that it does not violate a defendant's right to notice of the charges against him or her), *cert. denied*, 479 U.S. 934, 107 S.Ct. 409, 93 L.Ed.2d 361 (1986). Thus, in petitioner's case, the district court charged the jury that it could find petitioner guilty as a principal, as a coconspirator, or as an aider or abettor.

Charging a defendant as a conspirator or aider and abettor does not, however, alter the government's responsibility to establish intent to kill. Ohio law on complicity provides that for a defendant to be convicted as an aider or abettor or conspirator, he or she must possess "the kind of culpability required for commission of [the principal] offense," here, a purpose to kill. Ohio Rev. Code Ann. §§ 2923.03(A)(2)-(3), 2903.01(A). In other words, Ohio does not adhere to the strict felony-murder rule. *State v. Lockette*, 49 Ohio St.2d 48, 358 N.E.2d 1062, 1070 (1976), *rev'd on other grounds sub nom. Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Nevertheless, Ohio courts permit a jury to infer an aider and abettor's intent to kill when

> the facts show that the participants in a felony entered into a common design and *either* the aider or abettor knew that an inherently dangerous instrumentality was to be employed to accomplish the felony *or* the felony and the

> manner of its accomplishment would be reasonably likely to produce death.

State v. Scott, 61 Ohio St.2d 155, 400 N.E.2d 375, 382 (1980) (citing *Lockett*, 358 N.E.2d at syllabus ¶¶ 3-4).

Petitioner contends that in attempting to explain these principles of Ohio law, the trial court's instructions unreasonably confused the jury. The court charged that

> [p]urpose to kill is an element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendants *or co-defendants or aiders and abettors*, if you so find, a specific intention to kill the decedent Henry Podborny.

(Emphasis added). Similar instructions were read concerning the intent elements of aggravated robbery and kidnapping. The district court ruled that these instructions deprived petitioner of a fair trial because they improperly suggested that he could be convicted of these offenses as an aider and abettor or conspirator even if only his codefendants, and not petitioner himself, possessed the requisite intent to kill.

However, when read against the backdrop of Ohio complicity law, the court's reference to "defendants or co-defendants or aiders and abettors" appears to be nothing more than an unartful boilerplate reiteration that the same individuals could be found guilty *either* as principals ("defendants or co-defendants") or as "aiders and abettors." *See Hill*, 788 F.2d at 407-08. The phrase did not instruct the jury that it could convict petitioner by finding intent to kill in his codefendants or aiders and abettors;

rather, it reminded the jury that they could find that petitioner had intent to kill as a defendant *or* a codefendant *or* an aider and abettor. This reading is supported by the fact that the challenged phrase follows close on the heels of the court's unequivocal statement that "[p]urpose to kill is an element of the crime of aggravated murder." Furthermore, in its instructions, the court stressed at least twice that the jurors "must separately consider the elements applicable to each of the defendants as [if] he or she were separately tried" and not allow their conclusions about one defendant to influence the verdict as to the other defendants.

Moreover, elsewhere in his charge, the trial judge stated:

> The Court in order to assist you understand [sic] the element of purpose and purposely herein, wherein the evidence discloses an existence of complicity by way of aider and abettor and conspiracy, the Court instructs you, as I stated in the law of Ohio as follows: When you have an unlawful act being contemplated in an original conspiracy such as a kidnapping, stealing and so forth, although not identical with or similar to criminal acts charged, if the defendants conspired to commit the unlawful act in the manner in which it was performed *would reasonably and likely produce* the death of another, then each conspirator is equally guilty as the principal offender of the homicide although such conspirator, or person, or defendant, aider and abettor was neither present or had knowledge of the physical killing or the weapon used.

(Emphasis added.) While this instruction also was not ideal, it captured the essence of how a jury might properly infer an aider and abettor or conspirator's purpose to kill as explained by the Ohio Supreme Court. *See Scott*, 400 N.E.2d at 382; *Lockett*, 358 N.E.2d at syllabus ¶¶ 3-4. Accordingly, we conclude that petitioner has not demonstrated a reasonable likelihood that the jury interpreted the instructions, taken as a whole, to permit petitioner's conviction without proof that he himself had the requisite intent to kill.[2]

---

[2] We recognize that in *Clark v. Jago*, 676 F.2d 1099 (6th Cir.1982), this court overturned an Ohio aggravated murder conviction for *Sandstrom* error in instructions that bear some similarity to those given here. *Clark*, however, is both distinguishable on the facts and outdated as a matter of law. In this case, unlike *Clark*, the jury charge provided an adequate statement of the way an aider and abettor's intent may be inferred in Ohio. *See Clark*, 676 F.2d at 1105 (noting that court failed to provide this mechanism to the jury). In addition, the court in *Clark* had charged that defendant "and/or his accomplice" must possess the requisite intent to kill. *Id.* Such an instruction more clearly suggests that intent by only one of the two would suffice for conviction of both defendants. In contrast, the court's reference in petitioner's case to "defendants or co-defendants or aiders and abettors" more likely indicates that the court was merely using three different labels for all three defendants as a group. Any implication that each of the three defendants need not possess the required mens rea is much weaker. However, even if we deemed these factual distinctions insignificant, the legal standards upon which *Clark* based its holding have been superseded by more recent Supreme Court decisions, which have changed both the general standard for habeas review of constitutional trial errors. *Brecht*, ___ U.S. at ___, 113 S.Ct. at 1722, as well as the specific test for constitutional errors in jury instructions. *Estelle*, ___ U.S. at ___ & n. 4, 112 S.Ct. at 482 & n. 4. *Clark* therefore provides not support for petitioner's claim.

Petitioner suggests, however, that the prosecutor's closing argument compounded the potential for jury confusion. The prosecutor informed the jury that to obtain a conviction on a conspiracy theory in Ohio,

> [t]he State is bound to prove to a jury two things. First, that the crimes alleged have been committed. . . . The next thing we're bound to prove to you is that those accused of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes.

The trial court overruled defense counsel's objection to this misstatement of Ohio law. We agree that this improperly suggested that the prosecution need not make an independent showing of intent as to each defendant in order for conspiracy liability to attach.

Nevertheless, even if this remark, in conjunction with any confusion engendered by the court's instructions on mens rea, could be said to have abridged petitioner's constitutional rights, we conclude that these errors were not of such magnitude that they "had [a] substantial and injurious effect of influence in determining the jury's verdict." *Brecht*, ___ U.S. at ___, 113, S.Ct. at 1722. Petitioner argues that the instructions permitted the jury to find him guilty as an accomplice or conspirator by imputing to him the intent of the principals. However, all of the evidence upon which the jury could have relied to establish petitioner's guilt pointed to his guilt as a principal.[3]

---

[3] The court's instructions on defendant's liability as a principal clearly required the jury to find that "the killing was done purposely and . . . with prior calculation and design."

Petitioner and Lloyd Allen were in petitioner's bar when Henry Podborny entered, and petitioner exited his establishment with Podborny's wallet and other possessions just minutes later. One witness testified that petitioner had told him that he and Allen had killed a man and placed his body in the field next to the witness' home, where Podborny's corpse was in fact discovered. In addition, physical evidence admitted at trial tended to show that Podborny was killed in petitioner's bar. Authorities found blood of Podborny's type spattered on the walls of petitioner's saloon and discovered paint on Podborny's body that was similar to the paint in the bar. Finally, the prosecutor consistently portrayed petitioner to the jury as a principal. Consequently, any error by the trial court pertaining to the intent of conspirators or aiders and abettors did not injuriously influence the jury's decision to convict petitioner as a principal.

IV.

The district court also held that several rulings of the trial court on the admission of prejudicial evidence, together with the prosecutor's inflammatory closing remarks, deprived petitioner of a fundamentally fair trial. After a careful review of the record, we conclude that these errors were not of constitutional dimensions, but were at most errors in the application of state law. As the decisions of both the Supreme Court and this circuit make clear, "federal habeas corpus relief does not lie for errors of state law" because "it is not the province of a federal habeas court to reexamine state court determinations on state law questions." *E.g., Estelle*, ___ U.S. at ___, 112 S.Ct. at 480; *Walker v. Engle*, 703 F.2d 959, 962 (6th

Cir.), *cert. denied*, 464 U.S. 951, 104 S.Ct. 367, 78 L.Ed.2d 327 (1983). Under federal constitutional standards, the trial court's evidentiary rulings and the prosecutor's comments were not so prejudicial, either individually or in combination, that they rendered petitioner's trial fundamentally unfair.

V.

For the foregoing reasons, we **reverse** the judgment of the district court conditionally granting the writ of habeas corpus.

No. 92-3763

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT O'NEAL, Petitioner-Appellee, v. TERRY L. MORRIS, SUPT., Respondent-Appellant.	)	ORDER

BEFORE: MILBURN, RYAN, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk pe

SUPREME COURT OF THE UNITED STATES

No. 93-7407

Robert O'Neal,
Petitioner

v.

Terry L. Morris, Warden

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 2 presented by the petition.

April 4, 1994

JUN 2 1994
OFFICE OF THE CLERK

No. 93-7407

In The

Supreme Court of the United States

October Term, 1993

ROBERT O'NEAL,

Petitioner,

vs.

FRED McANINCH, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

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QUESTION PRESENTED

WHEN A PETITIONER HAS ESTABLISHED A CONSTITUTIONAL VIOLATION IN A FEDERAL HABEAS ACTION, DOES THE STATE HAVE THE BURDEN OF PROVING THE ERROR WAS HARMLESS UNDER *BRECHT V. ABRAHAMSON*, 113 S. Ct. 1710 (1993)?

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The decision of the United States Court of Appeals for the Sixth Circuit is reported. *O'Neal v. Morris*, 3 F.3d 143 (6th Cir. 1993) (Joint Appendix (hereinafter J.A.) 217-29). The entry of the Court of Appeals denying rehearing and suggestion for rehearing *en banc*, (J.A. 230), is not reported.

The judgment and opinion of the United States District Court for the Southern District of Ohio, Western Division, (J.A. 211-16), the Magistrate's Supplemental Report and Recommendation, (J.A. 200-12), the district court's original remand order, (J.A. 191-99), and the Magistrate's Report and Recommendation, (J.A. 99-190), are unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 20, 1993. (J.A. 217.) The order of the Court of Appeals denying O'Neal's petition for rehearing and suggestion for rehearing *en banc* was entered on October 4, 1993. (J.A. 217, 230.) The petition for certiorari was timely filed on January 3, 1994, and was granted on April 4, 1994.

The Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

FOURTEENTH AMENDMENT

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Ohio Revised Code Annotated, Section 2903.01 – Aggravated Murder

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The United States Code, 28 U.S.C. § 2243

STATEMENT OF THE CASE

A. Procedural History

Dimple Podborny, Lloyd Allen, and Petitioner Robert O'Neal (hereinafter O'Neal), were tried jointly and found guilty, in October 1981, of the kidnapping (Ohio Revised Code Annotated (hereinafter O.R.C.) Section 2905.01), aggravated robbery (O.R.C. Section 2911.01), and aggravated murder (O.R.C. Section 2903.01) of Henry Podborny. After exhausting his state remedies on appeal to the Cuyahoga County, Ohio Court of Appeals and the Supreme Court of Ohio, O'Neal filed a *pro se* petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Southern District of Ohio, Western Division, on September 24, 1986. (J.A.

1.) The District Judge assigned the case to a Magistrate who appointed counsel on August 22, 1988. (J.A. 1.) The Magistrate held an oral argument on July 27, 1990 and an evidentiary hearing on February 19, 1991. On January 22, 1992, the Magistrate issued his Report and Recommendation finding the jury instructions on intent were constitutionally defective, and that prosecutorial misconduct and erroneously admitted evidence deprived O'Neal of a fundamentally fair trial. (J.A. 161-62.)

Upon review of the Report and Recommendation, the District Court remanded the case to the Magistrate for further review on the jury instruction issue. (J.A. 191-99.) The Magistrate issued a Supplemental Report and Recommendation reaffirming that a new trial was mandated. (J.A. 200-10.) The District Court adopted both reports. (J.A. 211-16.)

Respondent (hereinafter the State) appealed to the United States Court of Appeals for the Sixth Circuit and obtained a stay of the new trial order. While the State's appeal was pending, this Court issued its decision in *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). (J.A. 1.) Without benefit of briefing on the impact of *Brecht*, the Sixth Circuit held that O'Neal had the burden of proving the constitutional error was not harmless. *O'Neal v. Morris*, 3 F.3d 143 (6th Cir. 1993). (J.A. 221.) The Sixth Circuit concluded that the constitutional errors resulting from the jury instructions and prosecutor's closing argument were harmless. *Id.* at 147. (J.A. 227-29.) O'Neal's timely Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied on October 4, 1993. (J.A. 1, 230.)

B. Trial Facts And Lower Court Rulings

This case involves the kidnapping, aggravated robbery, and aggravated murder of Henry Podborny and the

conspiracy to commit those acts. As a result of constitutionally defective jury instructions, erroneously admitted evidence, and egregious prosecutorial misconduct, O'Neal was wrongfully convicted of these crimes.

The events leading to the commission of these crimes began with the 1980 separation of Henry and Dimple Podborny of Chicago, Illinois. (Tr. 5350-51.) Shortly after the separation, Dimple began receiving threats, believed to be delivered at the direction of her husband, Henry. (Tr. 5315, 5321-22, 5349.) Turning to her daughter-in-law, Gail Toney, Dimple asked for assistance in hiring someone to provide protection. (Tr. 1762-63, 5349-50) (J.A. 7.)

Recognizing an opportunity to defraud her mother-in-law, Toney contacted James McLean, who agreed to play the role of the personal security provider. (Tr. 1752, 1764-65) (J.A. 708.) In June 1980, Toney introduced McLean to Dimple. A $5,000 fee was negotiated and paid. (Tr. 1776, 1778-83.) Two months later, terrified and believing her life was in danger from her husband after a month of threats made by McLean's associates, Dimple paid Toney another $10,000 to continue the personal protection. (Tr. 2981-83.)

Distressed by the continuing threats, Dimple again turned to Toney, this time to ask for assistance in arranging the murder of Henry. (Tr. 1784-86.) After consulting with McLean, Toney quoted her mother-in-law a fee of $25,000. (Tr. 1787.) A few days later, Dimple paid Toney $24,400. (Tr. 1791-94.)

Toney, the state's principal witness against O'Neal, testifed in exchange for a reduced sentence and admitted she would lie to stay out of prison. (Tr. 2120, 2126-27, 2351-53.) Toney claimed to have contacted and invited O'Neal to join the conspiracy. (Tr. 1807-08.) The plan, according to Toney, was to lure Henry to Cleveland, kidnap him, loot his Chicago residence and business,

drug him, and then release him safely in Chicago. (Tr. 1840-44.) In January 1981, the plan was put into action. Dimple lured her husband to Cleveland on the pretext of reconciling their marriage. (Tr. 1842.) According to Toney, she picked up Henry at the airport and drove him to O'Neal's saloon. (Tr. 1842, 1858) (J.A. 13-14.) Toney testified she dropped off Henry and watched him enter the saloon. Within minutes, according to Toney, O'Neal exited the saloon and gave her Henry's valuables. (Tr. 1859) (J.A. 14-15.)

Toney then began the process of looting the Podborny residence and business. (Tr. 1869-1906, 1915-18, 1928-29, 1935-37.) In February 1981, the plan began to unravel when the FBI arrested McLean for forging Henry's traveler's checks. (Tr. 3279-82.) McLean told the FBI that he had information concerning the disappearance of Henry and agreed to cooperate. (Tr. 3002.) Wearing a wire, McLean contacted Toney and discussed her and Gary Gabbard's (Toney's brother) participation in the kidnapping and robbery of Henry. (Tr. 4783-90.) No mention was made of O'Neal. (Tr. 3240-41.)

On April 24, 1981, Henry's body was found in a vacant lot in Cleveland, Ohio. (Tr. 4489-90.) He had been struck five times in the head with a blunt instrument and shot in the forehead. (Tr. 3708-09.) The assistant coroner testified that a date and time of death could not be accurately determined, but Henry " . . . had been dead for a period of at least weeks." (Tr. 3711) (J.A. 26.)

During the course of O'Neal's trial, the prosecutor improperly introduced evidence that O'Neal had been involved in a prior killing in which a man was shot in the head, (J.A. 139-51, 209-210), and numerous gruesome exhibits, including: "the actual 'smelly' clothing and

wrappings in which [Henry] was discovered; a jar containing the skin from [Henry's] left finger; a box containing scalp hair from [Henry]; and a crowbar found in O'Neal's bar." Magistrate's Report and Recommendation. (J.A. 132.) The Magistrate found that: "[T]he prosecutor introduced the gruesome evidence for the express purpose of enabling him to make an inflammatory argument at the conclusion of the case." (J.A. 151.)

During closing argument, the prosecutor made the following inflammatory argument to the jury, explaining how he wanted the jurors to use the gruesome evidence he had introduced:

> And as far as the crowbar, you pick that crowbar up, you get the dirt on your hands, you tell me about it. There is nothing on the crowbar, but when you get back there, think about what it might be like, first of all, to sit down and talk about kidnapping another human being. Get into the case. You are going to have his clothes back there. Grab those things, they stink, they've got blood on them. Wrap yourself in that blanket and see what the victim of a murder is like.
>
> MR. D'ANGELO: Objection.
>
> THE COURT: Overruled.
>
> MR. MARINO: As I said, I asked you to do this, to get into the case, to really handle this case. You can always wash up later, folks. To find out how seedy an act is, to grab a man and murder him, pick up that tire iron and ask yourselves to really take that iron yourself and hit somebody in the head five times, could you do that? Who could be a murderer. Who could but a man who would never – he would be crazy to kill someone with a registered gun.

(Tr. 6121-26) (J.A. 63-65.)

Immediately after the prosecutor's closing argument, the trial court improperly instructed the jury by relieving

the State of the burden of proving the intent element of each of the crimes charged. (J.A. 169-90.) For example, regarding aggravated murder, the trial court instructed:

> Purpose to kill is an element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the minds of the defendant *or co-defendant or aiders and abettors*, if you so find, a specific intention to kill the decedent Henry Podborny.

(Tr. 6159) (J.A. 170) (emphasis added).

The prosecutor compounded the impact of these defective instructions by encouraging the jury to use the instructions to determine O'Neal's guilt or innocence. The Magistrate identified the prosecutor's conduct in his Report:

> MR. MARINO: Now, I fear that defense counsel gave you the impression that each defendant must commit every element of the crime to be liable (sic). That's incorrect."

(Tr. 6075.) The judge overruled an objection to the statement, thus appearing to endorse it. *Id.* The prosecutor continued:

> MR. MARINO: In the state of Ohio and in most states in my opinion we have what's called conspiracy and the judge is going to tell you about that. The State is bound to prove to a jury two things. First, that the crimes alleged have been committed. And at this point, is there any doubt in your mind that the man was kidnapped, he was robbed, he was bludgeoned and shot to death. The next thing we're bound to prove to you is that those accused of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes.

> MR. MILANO: Objection. It is misstatement of the law, sir.
>
> THE COURT: Overruled.
>
> MR. MARINO: Folks, if that's a misstatement of the law, you are the second jury to hear it (referring to the trial of the codefendants).

Magistrate's Report and Recommendation. (Tr. 6075-76) (J.A. 129-30.)

During jury deliberations, the jury sent the following question to the trial court: "Can we please have a brief definition on the laws of aggravated murder?" (Tr. 6207-08) (J.A. 77.) The trial court repeated the defective instructions, and the jury returned guilty verdicts on all counts. (J.A. 77-82.)

The District Judge adopted the Magistrate's conclusion that the jury instructions and prosecutor's argument were, in the context of O'Neal's trial, constitutional errors. (J.A. 130-31, 206-09, 214.) According to the Magistrate:

> The jury was left with the impression that the State did not have to prove beyond a reasonable doubt an independent intent to commit each crime so long as it proved that each defendant was in some way involved in a conspiracy that eventually led to kidnapping, robbery, and murder.

Magistrate's Report and Recommendation. (J.A. 130.)

On the State's appeal to the Sixth Circuit, the court agreed that the prosecutor's closing argument "improperly suggested that the prosecution need not make an independent showing of intent as to each defendant in order for conspiracy liability to attach." *O'Neal*, 3 F.3d at 147 (J.A. 227.) However, the Sixth Circuit concluded that the constitutional errors resulting from the jury instructions and closing argument were harmless because " . . . all of the evidence upon which the jury could have

relied to establish [O'Neal's] guilt pointed to his guilt as a principal . . . [and] any error by the trial court pertaining to the intent of the conspirators or aiders and abettors did not injuriously influence the jury's decision to convict [O'Neal] as a principal." *Id.* (J.A. 227-28.)

SUMMARY OF ARGUMENT

I. Throughout this country's history, in both the constitutional and nonconstitutional contexts, and as a matter of common law, statutory provision, and federal rule, the burden of demonstrating that a proven error was or was not harmless has always rested with the State. *Chapman v. California*, 386 U.S. 18, 24 (1967) (constitutional errors); *Kotteakos v. United States*, 328 U.S. 750, 760-61 (1946) (nonconstitutional errors); *United States v. Olano*, 113 S. Ct. 1170, 1778 (1993) (Fed. R. Crim. P. 52(a)).

In *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), this Court evidenced no intention to change the longstanding rule predating *Chapman* that the party that committed and stands to benefit from a proven constitutional violation has the burden of showing the violation did not affect the proceeding. What the Court did change with *Brecht* was *Chapman's* harmless error *standard*. The Court decided that the "harmless beyond a reasonable doubt" standard did not apply in federal habeas review. *Brecht*, 113 S. Ct. at 1721. Instead, the Court held that "the standard for determining whether habeas relief must be granted is whether the [constitutional] error 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Id.* at 1714 (quoting *Kotteakos v. United States*, 328 U.S. at 776). The Court adopted the *Kotteakos* standard because it is "grounded in the federal harmless error rule" and "federal courts may turn to an existing body of case law to apply it." *Id.* at 1722. The

Kotteakos federal harmless error standard places the burden of proof on the issue of harmless error on the government.

The Sixth Circuit incorrectly interpreted *Brecht* to place the burden on O'Neal to prove not only that a constitutional error occurred, but also that it was not harmless. In explaining its departure from *Chapman*, the Court in *Brecht* repeatedly confined its discussion to the *standard* of proof, never purporting to change, either *Chapman's* or the longstanding pre-*Chapman* allocation of the *burden* of proof to the State. The Court's statement in *Brecht* that petitioners are not entitled to relief unless they can establish the constitutional error resulted in "actual prejudice," *Brecht*, 113 S. Ct. at 1722, is a synonym for the harmless error standard a petitioner must meet.

The concurring opinion that supplied the fifth vote for the majority in *Brecht*, as well as all the other authorities that *Brecht* identified in defining the new standard of harmlessness on habeas review, assign the burden of proof to the State. *See Kotteakos*, 328 U.S. at 760; *United States v. Lane*, 474 U.S. 438, 449 (1986). To make *Brecht's* application consistent with all the statutes, rules, and decisions it treats as authoritative, the Court must place the burden of proving harmless error on the State.

II. The Court's habeas decisions have effectuated the State's interests in finality, comity, and federalism by excluding certain issues that do not bear on guilt or innocence, *see Stone v. Powell*, 428 U.S. 465, 482 (1976), by enforcing procedural defaults, *see Wainwright v. Sykes*, 433 U.S. 72, 87-89 (1977), and by only applying constitutional rules in existence when a conviction becomes final, *see Teague v. Lane*, 489 U.S. 288, 306 (1989). At the same time, the Court's decisions have protected the reliability of the trial process by ensuring that habeas relief will be

afforded to petitioners who are innocent or would otherwise be victims of a miscarriage of justice. *Sykes*, 433 U.S. at 91; *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The Court has also resisted broad-based attacks on the writ designed to eliminate from review issues that are central to the correct ascertainment of guilt. *See Jackson v. Virginia*, 443 U.S. 307 (1979); *Withrow v. Williams*, 113 S. Ct. 1745 (1993). Throughout its modern jurisprudence the Court has preserved the core function of the writ as a remedy for fundamentally unfair trials and for avoiding conviction of the innocent.

Brecht's standard of proof for harmless error sufficiently accommodates the State's interests in finality without changing the burden of proof. Habeas relief is now limited to petitioners who actually had a fundamentally unfair trial (constitutional errors had a substantial and injurious effect or influence in determining the jury's verdict, *Brecht*, 113 S. Ct. at 1722) rather than the possibility of one, as under the *Chapman* standard. *Brecht* increases the likelihood that retrials will occur only in situations where removal of the error may make a difference in the outcome. A change in the longstanding rule on the burden of proof for harmless error is unnecessary.

The central focus of the Court's jurisprudence is the writ's assurance that constitutional errors do not cause the conviction of the innocent. Giving habeas petitioners the burden to prove a constitutional error is not harmless will increase the risk of an erroneous decision and will not ensure the accuracy of convictions. Harmless error analysis speaks directly to the reliability of criminal procedures and the accuracy of their outcomes. The Court has acknowledged that harmless error analysis is inherently difficult and often speculative. *See Sullivan v. Louisiana*, 113 S. Ct. 2078, 2082 (1993); *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988). Since the vast majority of habeas

petitioners proceed *pro se*, without legal training, and without access to the complete record, they are ill-equipped to bear the burden of proof. Given the imbalance between the State and most habeas petitioners, switching the harmless error burden of proof to petitioner may substantially increase the number of unremedied constitutional errors affecting the reliability of trials. Such result is inconsistent with the Court's habeas jurisprudence and with the goals of fair trials and accurate determinations of guilt or innocence.

Placing the burden of proof on petitioner is also inconsistent with current habeas practice. Petitioners now must justify they are entitled to relief when they procedurally default their claims. Likewise, the equitable nature of habeas practice should require that once the petitioner establishes the State has violated his constitutional rights, the State should bear the burden of proving its violation was harmless. Moreover, harmless error is an issue normally pleaded by the State to avoid the consequences of constitutional violations, similar to the other habeas defenses of non-exhaustion, non-retroactivity, procedural default, and abuse of the writ. Further, the State has access to the complete record and is better positioned to identify the salient facts and arguments on the harmless error issue.

More importantly, shifting the harmless error burden to petitioner could drastically increase the federal courts' workload. If showing prejudice becomes a part of a habeas petitioner's burden, it could drastically increase the length, complexity, and time required to plead, brief, argue, and decide habeas cases. This issue would be addressed as to all claims in all cases throughout the habeas proceedings. Efficiency counsels that the burden remains a part of the State's case. Finally, the *Kotteakos* body of case law (allocating the burden of proof on

harmless error to the State) will be of no value to the habeas court if the burden is allocated to the petitioner.

The considerations of finality, comity, and federalism do not support a change in the current burden of proof. When habeas petitioners have established constitutional violations, the State's interests have been accommodated. *See McCleskey v. Zant*, 499 U.S. 467 (1991). Requiring habeas petitioners to initially establish prejudice to obtain relief, the same as petitioners who procedurally default their claims, would not only be inequitable, but would deprive the Court's jurisprudence of a rational uniformity. The State does not have a valid interest in the finality of a conviction if there has not been a reliable determination of guilt. *See Stone*, 428 U.S. at 491 n.31. Requiring a petitioner to prove a constitutional error harmless will not ensure the accuracy of convictions or avoid conviction of the innocent.

III. For these reasons, the burden of proving a constitutional error was harmless error must be placed on the State. Because the Sixth Circuit erroneously placed the harmless burden on O'Neal, this case must be remanded to the Sixth Circuit for harmless error review. Since the impact of *Brecht* was not briefed in the Sixth Circuit before O'Neal's case was decided, a remand will afford the parties an opportunity to submit their best arguments before the court conducts its harmless error analysis. Principles of due process and fair procedure require no less. *See Lankford v. Idaho*, 500 U.S. 110, 126 n.22 (1991).

With a fair allocation of the burden to the State, O'Neal is entitled to habeas relief because the constitutionally defective jury instructions, coupled with the prosecutorial misconduct, did have a substantial and injurious effect on the jury verdict. In finding the constitutional errors harmless, the Sixth Circuit failed to consider the following critical items: (1) the impact of the

improper transferred intent instructions on the defense's theory of actual innocence; (2) the evidence that did not neatly fit within the State's theory of O'Neal's guilt as a principal, but did fit within the State's alternative theory that O'Neal could be convicted as an aider and abettor lacking any intent to kill; (3) the wide range of errors and prosecutorial misconduct at O'Neal's trial that made the jury prone to use the defective instructions to convict; and (4) the evidence that the defective, unconstitutional jury instructions and the prosecutor's improper argument confused the jury.

ARGUMENT

I. *BRECHT V. ABRAHAMSON*, 113 S. CT. 1710 (1993), DID NOT CHANGE THE LONGSTANDING RULE THAT THE PARTY THAT COMMITTED AND STANDS TO BENEFIT FROM A PROVEN CONSTITUTIONAL VIOLATION HAS THE BURDEN OF SHOWING THE VIOLATION DID NOT AFFECT THE PROCEEDING.

A. The Nature Of Harmless Error Analysis Has Long Been Understood To Require Allocating The Burden Of Proof To The State.

A federal court's habeas corpus jurisdiction is invoked when a petition is filed on behalf of a person who is held in state custody in violation of the Constitution, laws or treaties of the United States. 28 U.S.C. § 2254(a). The federal court must dismiss the petition unless it reveals on its face that the prisoner is entitled to relief. Rule 4, Rules Governing Section 2254 Cases in the United States District Courts (hereinafter Rules Governing Section 2254 Cases). To obtain relief a petitioner must prove that the State has committed a constitutional error. Only at this point does the question of harmless error arise. "[H]armless error analysis is triggered only *after* the

reviewing court discovers that an error had been committed." *Lockhart v. Fretwell*, 113 S. Ct. 838, 842 n.2 (1993); *accord Greer v. Miller*, 483 U.S. 756, 761 n.3 (1987).

The burden of proving harmless error has historically rested with the party that benefited from the error.[1] In *Chapman v. California*, 386 U.S. 18, 22 (1967), this Court held for the first time that some constitutional errors may be harmless, *i.e.*, may have little or no effect on the outcome of the trial.[2] The Court recognized, however, that constitutional errors "affect[ing] substantial rights" of a defendant cannot be harmless. *Id.* at 23. The Court recognized as well that, in fairness, the State should bear the burden of proving the error it committed was harmless:

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.

Id. at 24. As the *Chapman* Court noted, the same equitable considerations had prompted the allocation of the burden of proof to the wrongdoer under the original common-law harmless error rule:

> It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.

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[1] *See* Brief for Timothy Scott Sherman as *Amicus Curiae* in Support of Petitioner, Section 1.

[2] Prior to *Chapman* a constitutional violation resulted in an automatic new trial. *Payne v. Arkansas*, 356 U.S. 560 (1958); *Spano v. New York*, 360 U.S. 315 (1959); *Lynumn v. Illinois*, 372 U.S. 528 (1963); *Haynes v. Washington*, 373 U.S. 503 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966).

Id. (citing 1 Wigmore, Evidence § 21 (3d ed. 1940).[3] The Court therefore held that the beneficiary of the constitutional error must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. *Id.*

Nearly two decades before *Chapman*, the Court had interpreted the federal harmless error statute governing nonconstitutional error to place the burden of proving any substantial, or "non-technical," error harmless on the government. *Kotteakos v. United States*, 328 U.S. 750, 760-61 (1946). Just last term, nearly three decades after *Chapman*, the Court confirmed that the burden of proving harmlessness under Federal Rule of Criminal Procedure 52(a) falls on the government. *United States v. Olano*, 113 S. Ct. 1770, 1778 (1993). Throughout this country's history, therefore, in both the constitutional and nonconstitutional contexts and as a matter of common law, statutory provision, and federal rule, the burden of demonstrating that a proven error was or was not harmless has always rested with the State. *Chapman*, 386 U.S. at 24.

Justice Blackmun summarized the Court's harmless error history concisely:

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[3] The Court has followed this equitable rule in civil cases where there is evidence a party has violated the other party's constitutional rights. *See Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973) (*prima facie* case of unlawful segregrative design on part of school authorities shifts to those authorities the burden of proving that other segregrated schools within the system are not also the result of intentionally segregrative actions); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772 (1976) ("petitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents and, therefore, the burden will be upon respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination.").

> Every harmless-error standard that this Court has employed, however, shares two salient features. [First,] once serious error has been identified, the burden shifts to the beneficiary of the error to show that the conviction was not tainted.

Darden v. Wainwright, 477 U.S. 168, 197 (1986) (Blackmun, J., dissenting) (citations omitted).

B. Although *Brecht* Changed *Chapman's* Harmless Error Standard, It Evidenced No Intention To Change The Longstanding Rule, Predating *Chapman*, That Gives The Proven Wrongdoer The Burden Of Proving Harmlessness.

Prior to *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), *Chapman's* "harmless beyond a reasonable doubt" standard of harmless error was applied in federal habeas cases. *See, e.g., Rose v. Clark*, 478 U.S. 570, 576 (1986); *Hopper v. Evans*, 456 U.S. 605, 613-14 (1982). In *Brecht*, the Court decided that the "harmless beyond a reasonable doubt" standard did not apply in federal habeas review. *Id.* at 1721. Instead, the Court held that "the standard for determining whether habeas relief must be granted is whether the [constitutional] error 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Id.* at 1714 (quoting *Kotteakos*, 328 U.S. at 776). The Court adopted this harmless error standard from its decision in *Kotteakos*, which since 1946 had governed harmless error analysis for nonconstitutional errors under the federal harmless error statute. Id. at 1718. In explaining its departure from *Chapman*, the Court repeatedly confined its discussion to the *standard* of proof, never purporting to change either *Chapman's* or the longstanding pre-*Chapman* allocation of the *burden* of proof to the State:

> The imbalance of the costs and benefits of applying the *Chapman* harmless-error *standard*

> on collateral review counsels in favor of applying a less onerous *standard* on habeas review of constitutional error. The *Kotteakos standard*, we believe, fills the bill. The test under *Kotteakos* is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 328 U.S., at 776, 66 S. Ct., at 1253. Under this *standard*, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice." See *United States v. Lane*, 474 U.S. 438, 449, 106 S. Ct. 725, 732, 88 L.Ed.2d 814 (1986). The *Kotteakos standard* is thus better tailored to the nature and purpose of collateral review, and more likely to promote the considerations underlying our recent habeas cases.

Brecht, 113 S. Ct. at 1721-22 (emphasis added).

The Sixth Circuit in this case interpreted the above passage in *Brecht* to mean that O'Neal had the burden of proving not only that a constitutional violation occurred but also that it was not harmless. *O'Neal*, 3 F.3d at 145. (J.A. 221.) This interpretation is incorrect, for several reasons. First, the only issue before the Court in *Brecht* was whether the *Chapman* harmless error *standard* applies in habeas cases. *Brecht*, 113 S. Ct. at 1713-14. This was the only issue on which the Court granted review and the only issue the Court undertook to address and decide. *See id.* at 1721-22. Although *Brecht* reprised both the *Chapman* standard of proof and *Chapman's* allocation to the State of the burden of proof, *id.* at 1717, it confined its holding to the standard, and not the burden, of proof. *Id.* at 1717-18. Thus, the burden of proof issue was not decided. *See Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974) (constitutional claims are not decided until fully explored and

considered). At most, the Sixth Circuit's interpretation relies on a *dictum* in *Brecht*.

Second, although *Chapman* defined the standard of harmlessness that the Court modified in *Brecht*, *Chapman* was not responsible for allocating the burden of proving harmlessness to the State. That allocation had long predated *Chapman*, so more than a change in *Chapman* would be needed to revise the allocation of the burden of proof to the State. Yet, to the extent the *Brecht* Court addressed pre-*Chapman* practice, *e.g.*, in *Kotteakos*, it *endorsed* that practice. *See, e.g., Brecht*, 113 S. Ct. at 1718, 1721-22 (adopting *Kotteakos* standard).

Third, the Court's statement that petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice,' " *id.* at 1722, does not create a burden of proof, even in *dicta*. *See Elder v. Holloway*, 114 S. Ct. 1019, 1022-23 (1994) (lower court erred in interpreting language in prior Supreme Court decision, which said that plaintiffs had to make a particular "showing," as giving plaintiffs the burden of making the showing; in fact, the language simply described the legal standard the courts were to apply). The quoted language from *Brecht* can just as easily be read as a statement of the traditional principle that habeas petitioners bear the burden of establishing constitutional violations that withstand analysis under the harmless error (or synonymously, the "actual prejudice") standard that applies.[4] Given this noncontroversial interpretation, there is simply no basis for ascribing to this

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[4] The Court's use of the term "actual prejudice" adds no support to the court of appeals' controversial construction. Both the cited case, *Lane*, 474 U.S. at 449, and the Court's decision last term in *Olano*, 113 S. Ct. at 1778, make clear that, in this context, "actual prejudice" is simply a synonym for harmless error analysis. Indeed, the cited passage in *Lane* applies both *Kotteakos* and

passage the exceedingly controversial sea change in pre-existing law that the court of appeals thought it saw there.

Finally, as will be shown below, all of the authorities that *Brecht* cited in support of this passage, and particularly the *Kotteakos* decision from which the Court adopted its new habeas corpus standard, assign the burden of proof to the State. The Court in *Brecht* therefore evidenced no intention to change this longstanding rule.

C. Not Only The Concurring Opinion That Supplied The Fifth Vote For The Majority In *Brecht*, But Also All The Authorities That *Brecht* Identified As Authoritative In Defining The New Standard Of Harmlessness On Habeas, Assign The Burden Of Proof To The State.

Justice Stevens's vote was necessary to make a majority for Chief Justice Rehnquist's lead opinion in *Brecht*. In his concurring opinion, Justice Stevens stated that he joined the Court's opinion adopting the rule of *Kotteakos* precisely because *Kotteakos* places the burden of proving an error to be harmless squarely on the prosecution:

> Because [the *Kotteakos*] standard accords with the statutory rule for reviewing other trial errors that affect substantial rights; *places the burden on prosecutors to explain why those errors were harmless;* requires a habeas court to review the entire record *de novo* in determining whether the error influenced the jury's deliberations; and leaves considerable latitude for the exercise of judgment by federal courts, I am convinced that our answer is correct. I write separately only to emphasize that the standard is appropriately demanding.

Federal Rule of Criminal Procedure 52(a), both of which give the state the burden of proving harmlessness. *See I.C, infra.*

Brecht, 113 S. Ct. at 1723 (Stevens, J., concurring) (emphasis added); *accord id.* at 1723-24 ("*Kotteakos* plainly stated that unless an error is merely 'technical,' the burden of sustaining a verdict by demonstrating that the error was harmless rests on the prosecution," and "[a] constitutional violation, of course, would never fall in the 'technical' category.").

Justice Stevens's analysis of *Kotteakos* is correct. As *Brecht* noted, *id.* at 1718, the *Kotteakos* standard is based on the federal harmless error statute, now codified in 28 U.S.C. § 2111: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."[5] Interpreting the predecessor statute, the *Kotteakos* Court distinguished technical errors from errors affecting substantial rights. As to merely technical errors, i.e., errors unrelated to the rights of litigants,[6] the burden is upon the defendant seeking a new trial to show the error affected his substantial rights. *Kotteakos*, 328 U.S. at 760. On the other hand, where a violation affects any nontechnical right, *i.e.*, a right that is intended for the protection of litigants, *Kotteakos* puts the burden of demonstrating harmlessness upon the State:

> If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will,

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[5] *Kotteakos* construed Section 2111's predecessor, 28 U.S.C. § 391, but as *Brecht* recognized, Congress left untouched the phrase "affect substantial rights of the parties." *Id.* at n.7. Thus, "Section 2111 did not alter the basis for the harmless error standard announced in *Kotteakos.*" *Id.*

[6] *See Bruno v. United States*, 308 U.S. 287, 293-94 (1939) (technical errors concern the "mere etiquette" and "formalities" of trials and procedure).

> notwithstanding this legislation rest upon the one who claims under it.

Id. at 760-61.

In adopting the *Kotteakos* standard for harmless error, the *Brecht* Court also cited *United States v. Lane*, 474 U.S. 438, 449 (1986). *Brecht*, 113 S. Ct. at 1722. In *Lane*, the Court interpreted Federal Rule of Criminal Procedure 52(a),[7] the harmless error rule, in considering a defendant's misjoinder claim. *Lane*, 474 U.S. at 444. The Court noted that Rule 52(a) focuses on whether the error "affect[ed] substantial rights" and that the Court had construed a harmless error statute with similar language in *Kotteakos*. *Id.* at 449. Then, in the very passage this Court cited in *Brecht*, the *Lane*, Court applied the *Kotteakos* standard in interpreting Rule 52(a):

> Invoking the *Kotteakos* test, we hold that an error involving misjoinder "affects substantial rights" and requires reversal only if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict."

Lane, 474 U.S. at 449. (quoting *Kotteakos*, 328 U.S. at 776).

The *Brecht* Court's citation of this passage from *Lane* supports O'Neal's argument that the State bears the burden of proving harmlessness in three separate ways. First, the passage from *Lane* treats *Kotteakos* as authoritative, and, as shown above, *Kotteakos* gave the government the burden of proof on the nontechnical and constitutional error under consideration there. Second, the cited passage in *Lane* additionally makes Criminal Rule 52(a) authoritative; and, in *Olano*, 113 S. Ct. at 1777-78, the

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[7] Rule 52(a) provides: "*Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Court squarely reaffirmed that the government bears the burden of proving harmlessness under Rule 52(a) (as opposed to plain error, under Rule 52(b), which the defendant must prove). Third, the cited passage from *Lane* makes clear that the term "actual prejudice," on which the court below relied, has nothing to do with any allocation of a burden of proof to the petitioner. Instead it is simply a shorthand for the *Kotteakos standard* of proof, i.e., for an error that "had substantial and injurious effect or influence in determining the jury's verdict." *Lane*, 474 U.S. at 449.

Brecht further indicated it was adopting the *Kotteakos* standard because it is "grounded in the federal harmless-error rule" and "federal courts may turn to an existing body of case law in applying it." *Brecht*, 113 S. Ct. at 1722. As shown above, the *Kotteakos* federal harmless error standard places the burden of proof on the issue of harmless error on the government.

To make *Brecht's* application consistent with all the statutes, rules, and decisions that it treats as authoritative, this Court must place the burden of proving harmless error on the State.

II. THE STATE MUST BEAR THE BURDEN OF PROVING A CONSTITUTIONAL ERROR HARMLESS IN A FEDERAL HABEAS PROCEEDING TO ENSURE THE ACCURACY OF CONVICTIONS AND TO PRESERVE THE ESSENTIAL FUNCTION OF HABEAS CORPUS AS A REMEDY FOR CONSTITUTIONAL VIOLATIONS THAT RENDER A TRIAL FUNDAMENTALLY UNFAIR.

A. The Court's Modern Habeas Corpus Jurisprudence Balances The Competing Policies Of Protecting The Reliability Of The Trial Process And Effectuating The State's Interest In Finality, Comity, And Federalism.

This Court's modern habeas corpus jurisprudence has balanced two competing policies. On one hand, the

writ of habeas corpus is a fundamental safeguard against unlawful custody. *Fay v. Noia*, 372 U.S. 391, 449 (1963) (Harlan, J., dissenting). In enacting the federal habeas corpus statute, 28 U.S.C. § 2254, Congress clearly expressed its intent to provide a federal forum and remedy for a violation of a state prisoner's federal constitutional rights. *Reed v. Ross*, 468 U.S. 1, 10 (1984). The independent federal courts have been described by the Court, in the words of James Madison, as the "guardians of those [constitutional] rights," *Chapman*, 386 U.S. at 21, "to protect the people from unconstitutional action." *Reed*, 468 U.S. at 10. As one of the most important grants of jurisdiction to the federal courts to perform that task, the Great Writ of Habeas Corpus "indisputably holds an honored position in our jurisprudence." *Engle v. Isaac*, 456 U.S. 107, 126 (1982). It is a "bulwark against convictions that violate fundamental fairness." *Id.*

On the other hand, in defining the scope of the modern writ, the Court has paid close attention to the competing policies of finality of convictions, comity, and federalism that are implicated when the federal courts review state judgments. *See Brecht*, 113 S. Ct. at 1719-20. In particular, the Court has sought to avoid an overly liberal allowance of the writ that would undermine the finality of state convictions, impinge on a state's sovereignty and good-faith efforts to honor constitutional rights, *id.* at 1720-21, or impose significant costs, such as problematic retrials. *Engle*, 456 U.S. at 128.

During the last two decades, this balancing process has led the Court to adjust habeas law so as to focus its remedial power on, and limit its effects on state interests to, situations in which the reliability of the trial process is threatened and there is a risk of the conviction of the innocent. Several decisions of the Court are illustrative.

In *Stone v. Powell*, 428 U.S. 465, 482 (1976), the Court determined that Fourth Amendment search and seizure claims were not cognizable in federal habeas proceedings when there was a full and fair opportunity to litigate them in the state courts. The Court found the benefits of applying the exclusionary rule on collateral review, i.e., deterrence, did not outweigh the costs to the system of excluding reliable evidence and often freeing the guilty. *Id.* at 489-90. Although the Court validated broad habeas corpus relief as an additional safeguard against the conviction of the innocent, *id.* at 491 n.31, it stressed that a petitioner's Fourth Amendment claims actually deflect the truth-finding process, *id.* at 490, and have "no bearing on the basic justice of his incarceration." *Id.* at 491-492 n. 31.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), a petitioner failed to comply with a state procedural rule in raising a constitutional claim in state court. The Court held this default constituted an adequate and independent state ground for the state courts' refusal to hear his claim, which barred habeas corpus relief. Because the petitioner was at fault for not respecting the State's rules and the State's interest in curing its own errors, the Court held that he could not obtain habeas relief unless he could meet the extenuating burden of showing "cause" for the procedural default and "prejudice" therefrom. *Id.* at 87-89; *accord Engle*, 456 U.S. at 129 (1982); *Murray v. Carrier*, 477 U.S. 478, 489 (1986); *Coleman v. Thompson*, 111 S. Ct. 2546, 2565 (1991); *see also Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1719-20 (1992) ("cause and prejudice" standard applicable to petitioner's failure to develop material fact in state court proceedings); *McCleskey v. Zant*, 499 U.S. 467, 490 (1991) ("cause and prejudice" standard applies to determine if there has been an abuse of the writ through inexcusable neglect).

Nevertheless, the Court in *Sykes* and subsequent cases held that this rule will not prevent a habeas court from hearing the claim of a petitioner who would otherwise be a victim of a "miscarriage of justice." *Sykes*, 433 U.S. at 91; *Engle*, 456 U.S. at 135; *Coleman*, 111 S. Ct. at 2565. "Where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray*, 477 U.S. at 496.

These goals were further expressed in *Teague v. Lane*, 489 U.S. 288 (1989), where the petitioner sought to establish a new rule of constitutional law in federal habeas proceedings. This Court denied relief, finding that the "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Id.* at 309. In reaching this conclusion, however, the Court was careful to create an exception for new rules or procedures that were "central to an accurate determination of innocence or guilt." *Id.* at 313. Throughout its modern jurisprudence, therefore, the Court has emphasized the importance of the writ in protecting the reliability and accuracy of the trial process and avoiding the conviction of the innocent.

At the same time, the Court has resisted broad-based attacks on the writ that would seriously impair its important functions. This is especially true when, unlike in *Sykes*, the petitioner has adhered to all state and federal procedural rules and has met a heavy burden of establishing that the State has violated important constitutional norms. For example, in *Withrow v. Williams*, 113 S. Ct. 1745 (1993), the Court was asked to extend *Stone* to bar habeas relief for violations of *Miranda v. Arizona*, 384 U.S. 436 (1966). The Court refused to do so because, unlike the Fourth Amendment exclusionary rule, *Miranda* safeguards "a fundamental trial right," *i.e.*, a defendant's Fifth Amendment privilege against self-incrimination,

which often helps to achieve the "correct ascertainment of guilt." *Withrow*, 113 S. Ct. at 1753. *See also Jackson v. Virginia*, 443 U.S. 307 (1979) (Court refused to apply *Stone* to Fourteenth Amendment due process claim that evidence was insufficient to support the conviction, stressing that the issue was "central to the basic question of guilt or innocence," *id.* at 323); *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (Court refused to apply *Stone* to claims of ineffective assistance of counsel, recognizing that the Sixth Amendment right to counsel is a fundamental trial right that "assures the fairness, and thus the legitimacy, of our adversary process," *id.* at 374); *Withrow*, 113 S. Ct. at 1757 (O'Connor, J., dissenting) (a prisoner's equitable interest in avoiding incarceration when innocent normally is sufficient by itself "to outweigh other concerns and justify adjudication of the prisoner's constitutional claim").

Similarly, in *Wright v. West*, 112 S. Ct. 2482 (1992), the State sought to have the Court change the settled rule that "mixed constitutional questions are 'subject to plenary federal [or *de novo*] review' on habeas." *Id.* at 2491 (quoting *Miller v. Fenton*, 474 U.S. 104, 112 (1985). The State asked the Court to replace this standard with one that afforded deference to state court determinations applying law to the specific facts of a case. *West*, 112 S. Ct. at 2486. The case was decided on other grounds, but Justice Thomas acknowledged, in his plurality opinion for the Court, that such a change would be "far-reaching." *Id.* at 2492. In a concurring opinion, Justice O'Connor indicated the Court has strongly adhered to the *de novo* review of constitutional claims on habeas and "always held that the federal courts, even on habeas, have an independent obligation to say what the law is." *Id.* at 2497 (O'Connor, J., concurring). Justice O'Connor warned that a move away from this standard would be a "substantial change in our construction of the authority conferred by the habeas corpus statute." *Id.* at 2498. The following Term in *Withrow* a majority of the Court then

reaffirmed the rule of de novo review. *Withrow*, 113 S. Ct. at 1754.

Finally, in another decision last Term, *Herrera v. Collins*, 113 S. Ct. 853 (1993), the Court made clear the crucial focus of habeas corpus relief: it is not simply the interest in accurate outcomes or the interest in correcting violations of federal law, but rather the confluence of both interests. As such, even proof of a colorable claim of innocence, in the absence of any violation of federal constitutional law, could not justify relief. *Id.* at 862. The Court thus emphatically reiterated that the federal court's remedial powers on habeas are focused on "constitutional violations occurring in the course of underlying state criminal proceedings." *Id.*

The above habeas decisions preserve the core function of the writ as a remedy for fundamentally unfair trials and for avoiding conviction of the innocent. The State's interests in finality, comity, and federalism also are accommodated. To receive plenary review of a constitutional claim, a petitioner must be properly before the court. Claims brought by petitioners who have disregarded state and federal rules and cannot comply with the Court's rules regarding exhaustion, procedural default, abuse of the writ, and retroactivity are not heard.

B. *Brecht's* Standard Of Proof For Harmless Error Sufficiently Accommodates The State's Interests Without Changing The Burden Of Proof.

Prior to *Brecht*, *Chapman* required relief if there was any " 'reasonable possibility' " that constitutional trial error contributed to the verdict. *Chapman*, 386 U.S. at 24 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). In *Brecht* the Court determined that habeas relief requires more certainty of harm to assure that the petitioner has been "grievously wronged" – the historic standard for granting habeas relief. *Brecht*, 113 S. Ct. at 1721. The Court therefore adopted the more forgiving *Kotteakos*

standard, which requires relief only if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 1722 (quoting *Kotteakos*, 328 U.S. at 776).

The *Brecht/Kotteakos* standard sufficiently satisfies the state's interest in finality. The *Brecht/Kotteakos* standard denies relief for errors having no substantial impact on the jury's deliberations and verdict. Relief is limited to petitioners who *actually* had a fundamentally unfair trial. Once the court reaches this degree of certitude that constitutional error causing prejudice actually occurred, a petitioner has been "grievously wronged." The historic habeas standard for relief has been met. The State's interest in finality is no longer decisive.

The *Brecht/Kotteakos* standard also adequately addresses the "social costs" involved in retrying defendants, such as "erosion of memory" or "dispersion of witnesses," *Brecht*, 113 S. Ct. at 1721, making reconviction on retrial more difficult. *Id.* Under the *Chapman* standard, there was a greater risk, due to these factors, that a defendant would be acquitted even though he deserved to be convicted. *See McCleskey v. Zant*, 499 U.S. at 491 ("[w]hen a habeas petitioner succeeds in obtaining a new trial the 'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time prejudice the government and diminish the chances of a reliable adjudication." (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986) (plurality opinion)). *Brecht* solved this problem by limiting habeas reversals to cases where the constitutional error actually affected, in a substantial and injurious way, the outcome of the trial. Under the *Brecht/Kotteakos* standard, therefore, there will be a high probability that any new outcome on retrial is a function of curing the constitutional error, and not a product of the staleness of evidence.

The *Brecht/Kotteakos* standard sufficiently accommodates the State's interest in finality. A change in the longstanding rule on the burden of proof regarding harmless error is therefore unnecessary and unwarranted. Moreover, as demonstrated below, it will undermine the important function of the writ in protecting the reliability of the trial process and avoiding conviction of the innocent.

C. Giving Petitioners The Burden To Prove A Constitutional Error Is Not Harmless Will Increase The Risk Of An Erroneous Decision By The Habeas Court And Not Ensure The Accuracy Of Convictions.

Under the Sixth Circuit's ruling, O'Neal not only had the burden of establishing the constitutional error, but also had the burden of proving it was not harmless. *O'Neal*, 3 F.3d at 145. (J.A. 221.) Such a major change in federal habeas law is unwise, unsound, and inconsistent with the Court's recent habeas jurisprudence. This change will create the substantial risk that inaccurate convictions, including those of actually innocent people, will be preserved.

As developed above, the central focus of this Court's modern habeas jurisprudence is the writ's assurance that constitutional errors do not cause the conviction of an actually innocent person. *Stone*, 428 U.S. at 491-92 n.31; *Teague*, 489 U.S. at 312-13; *Brecht*, 113 S. Ct. at 1729 (O'Connor, J., dissenting). In *Desist v. United States*, 394 U.S. 244 (1969), Justice Harlan stated one of the principal functions of the writ of habeas corpus is " . . . to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." *Id.* at 262 (Harlan, J., dissenting); *see also Teague*, 489 U.S. at 313 ("Since Mackey [*Mackey v. United States*, 401 U.S. 667 (1971)] was decided, our cases

have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review."). This view of habeas is, of course, consistent with the often stated principle that the central purpose of a trial is to decide the question of guilt or innocence. *Stone*, 428 U.S. at 490; *Rose v. Clark*, 478 U.S. at 577.

Harmless error analysis speaks directly to this central question of the reliability of criminal procedures and the accuracy of their outcomes. When a court conducts a harmless error analysis after finding constitutional error, it must quantitatively assess the error in the context of the other evidence to determine the effect it had on the fact-finding process at the trial. *Brecht*, 113 S. Ct. at 1717 (citing *Arizona v. Fulminante*, 499 U.S. 279, 281 (1991)); *accord Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). As this Court recognized in *Van Arsdall*:

> The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial . . .

Id. at 681 (citations omitted); *accord Fulminante*, 449 U.S. at 308 (Rehnquist, C.J. concurring). Thus, the harmless error standard and its proper application are "crucial to our faith in the accuracy of the outcome." *Brecht*, 113 S. Ct. at 1730 (O'Connor, J., dissenting); *see Lane*, 474 U.S. at 478 (Stevens, J., concurring and dissenting) ("A determination that an error was harmless is an extremely weighty conclusion; it implicates profound notions of fairness and justice."); R. Traynor, *The Riddle of Harmless Error* 80 (1970) ("[T]he evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex.").

In *Brecht*, 113 S. Ct. at 1722, the Court reduced the standard for finding a constitutional error to be harmless in a federal habeas proceeding. No longer will the State have to prove beyond a reasonable doubt that there is no reasonable possibility that the constitutional error contributed to the verdict. *Id.* at 1721; *see Chapman*, 386 U.S. at 24. Instead, habeas relief will only be granted where the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 113 S. Ct. at 1722 (quoting *Kotteakos*, 328 U.S. at 776). No less than four Justices of the Court dissented from the Court's departure from the *Chapman* standard. *See Brecht*, at 1725-32 (White, Blackmun, Souter, O'Connor, JJ., dissenting). Substantial doubts thus have been raised whether the new standard can adequately protect federal constitutional rights. Justice O'Connor specifically found that the new standard "increases the likelihood that a conviction will be preserved despite an error that actually affected the reliability of the trial." *Id.* at 1730 (O'Connor, J., dissenting).

As the 5-4 vote and the dissenters' concerns suggest, the balance struck in *Brecht* was delicate. As O'Neal demonstrates below, tipping the balance even further against the redress of proven constitutional errors by giving the petitioner the burden on the harmless error issue will skew the balance. It will increase the risk of preserving the conviction despite constitutional error that affected the reliability of the result.

This Court has frequently acknowledged that harmless error review is inherently difficult. *See, e.g., Sullivan v. Louisiana*, 113 S. Ct. 2078, 2082 (1993) (misdescription of the burden of proof vitiates jury's findings, and reviewing court can only engage in pure speculation of what a reasonable jury would have done); *Riggins v. Nevada*, 112 S. Ct. 1810, 1816 (1992) (guesses as to outcome of trial if

defendant had not been forcibly medicated would be purely speculative); *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988) (evaluation of consequences of an error in sentencing phase of a capital case may be more difficult because of discretion given to the sentencer). *See also United States v. Cerro*, 775 F.2d 908, 915 (7th Cir. 1985) (("It is always perilous to speculate on what the effect of evidence improperly admitted was on a jury, or what the effect of evidence improperly excluded would have been.") (citing Jeitelbaum, Sutton-Barbere and Johnson, *Evaluating the Prejudicial Effect of Evidence; Can Judges Identify the Impact of Improper Evidence on Juries?* 1983 Wis. L. Rev. 1147)); Traynor, *Supra*, at 29 ("It is not always easy to answer the [harmless error] question in the light or the dark of a trial."); *Kotteakos*, 328 U.S. at 764 ("The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting."); *Cf. Satterwhite*, 486 U.S. 256; *Riggins*, 112 S. Ct. at 1816; *Olano*, 113 S. Ct. at 1780-81 (all recognizing that in some situations harmless error analysis becomes so speculative as to be impossible). As stated by Chief Justice Rehnquist in his concurring opinion in *Sullivan*:

> In the typical case, of course, a jury does not make explicit factual findings; rather it simply renders a general verdict on the question of guilt or innocence. Thus, although it may be possible to conclude from the jury's verdict that it has found a predicate fact (or facts), the reviewing court is usually left only with the record developed at trial to determine whether it is possible to say beyond a reasonable doubt that the error did not contribute to the jury's verdict. *Moreover, any time an appellate court conducts harmless-error review it necessarily engages in some speculation as to the jury's decisionmaking process; for in the end no judge can know for certain what factors led to the jury's verdict.*

113 S. Ct. at 2084 (citations omitted) (emphasis added).

Given the inherent difficulty of harmless error analysis, the vast majority of habeas petitioners are ill-equipped to bear the burden of proof on the issue. It is well known that most federal habeas petitioners are unrepresented by counsel. *See Price v. Johnston*, 334 U.S. 266, 292 (1948) ("prisoners . . . act . . . often as their own counsel in habeas corpus proceedings"); Faust, Rubenstein & Yackle, *The Great Writ In Action: Empirical Light On The Federal Habeas Corpus Debate*, 18 N.Y.U. J.L. & Soc. Change, 637, 688 (1990-91) (1973-75 and 1979-81 data) ("[M]ost petitioners filed their habeas corpus petitions pro se."). Unlike the State, which is always represented by counsel, petitioners often must prepare their own petitions and subsequent pleadings without any legal training or ability to marshal the facts and law in their favor. Additionally, prisoners frequently do not have access to the complete record in their case. *See, e.g., State ex rel. Greene v. Enright*, 63 Ohio St. 3d 729, 590 N.E.2d 1257, *cert. denied*, 113 S. Ct. 667 (1992) (*pro se* defendant on direct appeal not entitled to have trial transcript sent to him in prison so he could prepare his appellate brief). Thus, most habeas petitioners would be at a distinct disadvantage in trying to meet such a critical burden of proof.

Given the imbalance between the State and most habeas petitioners, switching the burden of proof on harmless error from the State to the petitioner may substantially increase the number of unremedied constitutional errors affecting the reliability of trials. Such a result is inconsistent with this Court's habeas jurisprudence and with the goals of fair trials and accurate determinations of guilt or innocence. This is especially so in the wake of two decades worth of decisions of this Court limiting the availability of habeas relief to petitioners who have assiduously respected state procedural rules, who have borne

the burden of proving violations of well-established constitutional norms that affect the integrity of the trial process, and who are the victims of violations that cannot be shown to lack substantial effect on the outcome. In addition, such result fails to comport with the traditional principle that "[i]n the administration of criminal justice, our society imposes almost the entire risk of error on itself." *Addington v. Texas*, 441 U.S. 418, 423-24 (1979). *See also In re Winship*, 397 U.S. 358, 364 (1970).

D. Placing The Burden Of Proof On The Petitioner Is Not Consistent With Traditional Habeas Practice And Will Burden Rather Than Assist The Court In Deciding Which Constitutional Claims Are Entitled To Relief.

Placing the burden of proving harm on the petitioner is inconsistent with traditional habeas practice and will burden, rather than assist, federal courts in deciding which claims are entitled to relief. To begin with, by the time the harmless error question arises, habeas petitioners already will have met the burden of establishing a constitutional violation. In some cases that burden will have been very great. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish claim of ineffective assistance of counsel petitioner must show counsel violated essential duty to client and reasonable likelihood result of trial would have been different). As the Court's procedural default rules illustrate, see *II.A, supra*, once a party has demonstrated that the other party has not played by the established rules (in this case, *fundamental constitutional* rules), the burden should shift to the proven wrongdoer to show that its interests should be vindicated despite its wrongdoing. Thus, once procedural default or abuse of the writ is shown by the State, the petitioner has the burden to establish "cause" and "prejudice" to obtain habeas relief. *Sykes*, 433 U.S. at 87; *McCleskey*, 499 U.S. at

468. The equitable traditions of federal habeas practice should likewise require that once the petitioner has established that the respondent State has violated his constitutional rights, the State should bear the burden of showing its violation is harmless.

Moreover, harmless error is logically an argument or defense to be pleaded by the responding party to avoid the consequences of the proven wrongdoing. It is for this reason that courts have found the State waived the harmless error argument by failing to timely raise it. *See Amadeo v. Zant*, 486 U.S. 214, 228 (1988); *Holland v. McGinnis*, 963 F.2d 1044, 1057 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1053 (1993). Such allocation of the burden is dictated by longstanding harmless error practice in civil, criminal, constitutional, nonconstitutional, statutory, and common law contexts. *See I.A, supra.* In addition, it is consistent with the other habeas defenses of non-exhaustion, non-retroactivity, procedural default, and abuse of the writ which must be pleaded and proved by the State. *See Granberry v. Greer*, 481 U.S. 129, 134 (1987) (exhaustion); *McCleskey*, 499 U.S. at 482 (abuse of writ); *Godinez v. Moran*, 113 S. Ct. 2680, 2685 n.8 (1993) (non-retroactivity); *Estelle v. Smith*, 451 U.S. 454, 468 n.12 (1981) (procedural default).

Furthermore, allocating the burden to petitioner is not an efficient use of scarce judicial resources. The State's attorney has access to the complete record and is the party that Congress and this Court in the habeas rules have made responsible for responding to the allegations of the petition in an answer. *See* Rule 5, Rules Governing Section 2254 Cases; *Granberry*, 481 U.S. at 132 n.5. Respondent is in a much better position to identify the salient facts and legal arguments on the harmless error issue than most habeas petitioners. This current allocation of the burden of proof assists the court in its analysis of the

harmless error issue and ultimate decision-making. *See* Rule 5, Rules Governing Section 2254 Cases, Advisory Committee Note, 28 U.S.C. § 2254 at 1122 ("[T]he return serves several important functions: it permits the court and parties to uncover quickly the disputed issues."). Putting the burden on a lay petitioner will be less likely to do so. Judicial economy and use of resources will not be promoted if the court must seek out a lay petitioner's facts and arguments on the harmless error issue. A diligent habeas court may also see the need for an evidentiary hearing or further discovery if the facts have not been adequately marshaled by the petitioner. Even when represented by counsel, the petitioner is still not in a better position to answer the *Brecht/Kotteakos* harmless error question (whether the constitutional error had a substantial impact on the verdict). The petitioner has no better access to the relevant information than the state. *See Sullivan*, 113 S. Ct. at 2084. (Rehnquist, C.J., concurring) (harmless error determination must be made from record developed at trial).

More important, shifting the burden to the petitioner could drastically increase the federal courts' workload. If a petitioner must demonstrate that the error is harmful to obtain relief, doing so might become an essential part of every petitioner's burden in habeas cases. This may create an incentive, or even, eventually, a legal requirement on the part of petitioners to demonstrate harm as to every claim in every petition. *See* Rules 2 and 4 of the Rules Governing Section 2254 Cases (petitioner bears burden of comprehensively pleading bases necessary for relief, and federal court may summarily dismiss petition for failure to do so without securing answer from State). At the least, reallocating the burden would create an incentive on the part of the respondent to demand a showing of harm at the pleading stage as to all claims.

Making harm a threshold component of every claim in every habeas petition could drastically increase the length, complexity, and time required to plead, brief, argue and decide habeas corpus cases. Giving petitioners the burden on the issue and subjecting them to dismissal if they do not comprehensively treat the issue from the outset would inevitably force petitioners to address harmless error from the outset as to *all* claims in *all* cases. For example, given a habeas petition raising ten claims, the new burden on petitioner would create the possibility of ten new discussions devoted to "harm" in the petition, the answer, the opening and responsive briefs, the oral argument, and the opinion. Moreover, each discussion of error might have to be lengthy because each would require consideration of an as yet unadjudicated error in light of the entire record. The most efficient way to deal with the harmlessness issue is not to make it a part of petitioner's case. Otherwise, it threatens to become a major aspect of every claim in every case. Instead, it should remain a part of the State's case, but *only* if the State is found to have violated the Constitution.

Finally, the *Kotteakos* body of case law will not be of assistance to the court if the allocation of the burden of proof on harmless error is changed. In *Brecht*, the Court stated that it adopted the *Kotteakos* standard so that "the federal courts may turn to a body of case law in applying it" and "[t]herefore, application of the *Kotteakos* standard is unlikely to confuse matters for habeas courts." *Brecht* 113 S. Ct. at 1722. This will not be the case if this Court changes longstanding law and practice governing who has the burden of proof on harmless error. The *Kotteakos* case law discussing the harmless error issue in the context of the State's burden of proof not only will be of no value, but will be extremely confusing to federal courts. In addition, to require habeas courts to follow a different

procedure for analyzing harmless error issues in habeas proceedings than in other proceedings, such as federal postconviction proceedings, will contribute to erroneous decision-making. Simplicity and consistency in judicial procedures strongly counsel against a change in the traditional burden of proof on harmless error.

E. Considerations Of Finality, Comity, And Federalism Do Not Support A Change In The Current Burden of Proof Procedure.

Placing the burden of proof of harmlessness on petitioners who have established constitutional violations will not advance the interests of finality, comity, and federalism. These petitioners are properly before the court. They have exhausted their state remedies. They have not procedurally defaulted their claims in either the state or federal courts. They have not abused the writ. They have borne the burden of proving constitutional error. Moreover, under *Brecht*, they cannot obtain habeas relief if it is shown that the constitutional error had no substantial impact on the outcome of the trial. Under such circumstances, the interests of finality, comity, and federalism have been fully accommodated. *See McCleskey*, 499 U.S. at 492-93 ("The federal writ of habeas corpus overrides all these considerations, essential as they are to the rule of law, when a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition.").

Piling on petitioners the additional burden imposed by the court below thus is unnecessary in terms of the State's interest. Worse, the effect of that proposed burden would be to undermine the equitable force and prudential effect of the Court's procedural default and abuse of the writ doctrines. It would treat all petitioners as if they have procedurally defaulted their claims in the state or

federal courts and thereby harmed the State's interests. If all petitioners have to prove prejudice as part of their constitutional claim, then all will essentially have to make the same showing as petitioners who have procedurally defaulted or abused their claims. *See Sykes*, 433 U.S. at 87-89 (habeas petitioners who procedurally default their constitutional claims in state court must show "cause" for the default and "prejudice" therefrom to obtain relief); *McCleskey*, 499 U.S. at 468 (same burden as to "abused" claims).

This proposed subjection of all petitioners to a burden now reserved for those who have procedurally defaulted in the state or federal courts not only is unfair, it also deprives the Court's habeas jurisprudence of a rational uniformity by according the same treatment to petitioners who the Court has long recognized are *not* similarly situated. *See Keeney*, 112 S. Ct. at 1720 (application of cause-and-prejudice standards to habeas petitioner's failure to develop material fact in state court proceedings "advances uniformity in the law of habeas corpus"). *Cf. Olano*, 113 U.S. at 1178 (under the federal criminal rules the government has the burden of proving a properly preserved error was harmless; the defendant only bears the burden of proof on the prejudice issue when he has procedurally defaulted or forfeited the claim and must claim plain error (Rule 52(b)). Giving all, rather than only defaulted, petitioners a burden of proving prejudice could undermine the incentives the Court's default and abuse doctrines give petitioners to obey state and federal procedural rules.

Moreover, the State has no valid interest in the finality of a conviction if there has not been a fair trial and a reliable determination of guilt. Indeed, the Court in *Stone* expressly excluded constitutional claims bearing on guilt

or innocence from other habeas claims that impinge upon a state's interest in finality, comity, and federalism:

> Resort to habeas corpus, *especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty*, results in serious intrusions on values important to our system of government.
>
> . . . .
>
> We nevertheless afford broad relief, recognizing the need in a free society for an *additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty*.

Stone, 428 U.S. at 491-92 n.31 (emphasis added).

It is true there are costs to the system, such as problematic retrials, when habeas relief is granted. *Engle*, 456 U.S. at 128. These costs are, however, the inevitable consequence of three factors that, in our system, *require* relief *notwithstanding* its costs: (1) having superior federal constitutional law that governs state criminal proceedings in order to safeguard important individual liberties; (2) a state's demonstrated violation of that law that has not been shown to lack substantial effect; and (3) a federal statute adopted 127 years ago that requires federal habeas corpus relief in the event of a constitutional violation. 28 U.S.C. § 2254. As this Court has recognized, these costs are "an acceptable and necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence." *United States v. Mechanik*, 475 U.S. 66, 72 (1986). It is important to remember, however, these costs are incurred in only few cases where defendants' trials were fundamentally unfair. *Brecht*, 113 S. Ct. at 1719; *see also Estelle v. McGuire*, 112 S. Ct. 475, 482 (1991) ((" 'We have defined the category of infractions that violate fundamental fairness very narrowly.' ") quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)).

Finally, as pointed out above, see *II.B, supra,* the *Brecht* standard requires more certainty that the error adversely affected the jury's verdict than the *Chapman* standard. By doing so, the Court has increased the likelihood that retrials will occur only in situations where removal of the error may make a difference in the outcome. No further adjustment in habeas law is necessary to accommodate the State's interest in finality.

Requiring a petitioner to prove a constitutional error harmless would not ensure the accuracy of convictions or avoid conviction of the innocent. It would not permit the writ to serve as a remedy for those errors that violate fundamental fairness, constitute a miscarriage of justice, and are an extreme malfunction in the state criminal justice system. *See Brecht,* 113 S. Ct. at 1719-20. Rather, it would remove any guarantee that the writ would issue under such egregious circumstances, and thereby remove the federal courts as the "guardians of the people's federal rights." *See Reed,* 468 U.S. at 10.

III. BECAUSE THE SIXTH CIRCUIT ERRONEOUSLY PLACED THE BURDEN OF PROVING THE CONSTITUTIONAL VIOLATION WAS NOT HARMLESS ON O'NEAL, THIS CASE SHOULD BE REMANDED TO THE SIXTH CIRCUIT FOR HARMLESS ERROR ANALYSIS.

A. The Sixth Circuit Decided This Case Without The Benefit Of Briefing On The Impact Of *Brecht.*

Brecht v. Abrahamson did not change the longstanding rule that the party who committed and stands to benefit from a proven constitutional violation has the burden of showing that the violation did not affect the proceeding. Sixth Circuit law prior to, and after *Brecht,* placed the burden on the prosecution. *See Sherley v. Seabold,* 929 F.2d

272 (6th Cir. 1991) and *Stoner v. Sowders,* 997 F.2d. 209, 213 (6th Cir. 1993).

Because *Brecht* was announced while *O'Neal* was pending before the Sixth Circuit and after the parties' briefs had been filed, the appellate court did not have the benefit of the parties' analysis and reasoning in reaching its decision to place the burden on the habeas petitioner. Offering no analysis for its interpretation of *Brecht,* the Sixth Circuit abruptly changed existing law and erroneously placed the burden of proving the constitutional violation was not harmless on O'Neal. *O'Neal,* 3 F.3d at 147 (J.A. 221.) For this reason, O'Neal's case should be remanded to the Sixth Circuit for harmless error analysis with the burden placed on the prosecution. Remand would afford the parties an opportunity to submit their best arguments before the court conducts its harmless error analysis. Principles of due process and fair procedure require no less. *See Lankford v. Idaho,* 500 U.S. 110, 126 n.22 (1991) ("In a variety of contexts, our cases have repeatedly emphasized the importance of giving the parties sufficient notice to enable them to identify the issues on which a decision may turn."). Furthermore, this Court's general practice not to conduct harmless error analysis on the facts of a particular case, *Rose v. Clark,* 478 U.S. 570 (1986), and the extraordinary length (over 6200 pages) of the trial transcript strongly militate in favor of remand.[8]

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[8] Even if this Court determines the burden of proving the constitutional violation was not harmless was correctly placed on O'Neal, this case should be remanded to afford O'Neal an opportunity to satisfy the burden.

B. Under A Fair Allocation Of The Burden To The State, O'Neal Is Entitled To Habeas Relief.

The Magistrate and District Court in this case concluded that the trial court's jury instructions, in combination with the prosecutor's closing argument, unconstitutionally relieved the state of its burden of proving that O'Neal not only intended to participate in a conspiracy to kidnap and rob Henry, but also intended to kill him. (J.A. 130-31, 206-09, 214.)[9] Nonetheless, after giving O'Neal the burden of proving harm, the Sixth Circuit found these constitutional violations harmless because: (1) the record contained sufficient evidence of O'Neal's guilt; and (2) " . . . all of the evidence upon which the jury could have relied to establish petitioner's guilt pointed to his guilt as a principal." *O'Neal*, 3 F.3d. at 147. (J.A. 227.) Neither reason is sound. Indeed, given the dearth of proof in this record that O'Neal had the requisite intent, the Sixth Circuit's erroneous allocation of the burden of proving harmlessness has led to precisely the kind of error that habeas corpus was designed to correct – the affirmance of a constitutionally tainted conviction of one who may well be innocent of the offense.

This case was not as simple as the Sixth Circuit's Opinion suggests, for five reasons. First, the fact that the remaining evidence may be sufficient to support a conviction does not make the error harmless under the rule of *Brecht* and *Kotteakos*. *Brecht*, 113 S. Ct. at 1724 (Stevens, J., concurring).

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[9] For example, regarding the intent element of aggravated murder, the trial court instructed the jury that it must be established that "at the time in question there was present in the mind of the defendants *or co-defendants or aiders and abettors*, if you so find, a specific intention to kill the decedent Henry Podborny." (Tr. 6159) (J.A. 170) (emphasis added).

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. *The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.*

Kotteakos, 328 U.S. at 764-65 (emphasis added).

Second, the appellate court failed to consider the impact of the improper transferred intent instructions, (J.A. 169-190), on the defense's theory of actual innocence. The physical evidence and all the testimonial evidence save Toney's (given in return for a reduced sentence) was consistent with the defense theory that Toney and her brother, Gabbard, with or possibly without the help of Waress, killed Henry at O'Neal's saloon without O'Neal's knowledge, and that O'Neal's participation, if any, in the conspiracy did not include an intent to kill Henry. (Tr. 3227-30, 5840-43.)[10] Toney told the other conspirators about O'Neal; O'Neal was not part of their discussions. (Tr. 2062, 2065, 2071, 3069, 3222-23, 3232,

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[10] The day after Henry disappeared, Toney told McLean that she and her brother had taken Henry to Gabbard's home in Amherst, Ohio to hold him a few days. (Tr. 2989.) Toney also told McLean that Henry was moved later from Amherst to Cleveland. (Tr. 3233-34.) It is possible that Henry was later taken to O'Neal's saloon and killed. Henry's date of death could not be determined. (Tr. 3712.)

3240-41, 5177, 5249.) Under the constitutionally defective instructions, however, O'Neal could have been found guilty of murder based on the mental state of Toney or Gabbard as long as O'Neal played some part in the balance of the conspiracy.

Moreover, there is ample evidence in the record of O'Neal's actions that do not reveal any homicidal or even criminal intent, but nevertheless may have furthered the conspiracy of Toney and Gabbard, and may have qualified O'Neal for conviction under the defective instructions and prosecutorial argument. For example, there was evidence that O'Neal: (1) provided Dimple with protection during her divorce by traveling with her to Chicago[11] (Tr. 4837-39, 4870); (2) attempted to help Toney invest $6,500 of the money she received from Dimple for attempting to kill Henry (Tr. 4024-32, 4042-44, 4841, 4885-86) (J.A. 47-48); (3) gave Toney, his employee, the keys to his saloon, where Toney and others secreted and killed Henry (Tr. 4900, 4952); and loaned Toney his .38 caliber Smith and Wesson handgun. (Tr. 4878-79.) The defective transferred intent instructions, coupled with the prosecutor's improper closing argument, would have confused and led any rational juror to impute Toney's criminal responsibility to O'Neal without proof of O'Neal's mental culpability or involvement in the actual robbery, kidnapping, and murder of Henry. As the Magistrate found:

> The jury had substantial credibility issues to resolve. The improper instructions on state of mind could have led the jury to convict even if

[11] The jury could have found O'Neal guilty because he assisted Toney when he protected Dimple on the Chicago trip. The prosecutor's closing argument also implied that O'Neal was guilty solely due to the trip to Chicago, since he provided Dimple with protection. (Tr. 6094-95) (J.A. 62-63.)

they believed O'Neal's version of events, on the basis that O'Neal had been involved in a conspiracy to obtain money from either Mrs. or Mr. Podborny that eventually led to kidnapping, robbery and murder. See discussion *supra* pp. 18-24 [J.A. 123-31]. The impartial atmosphere in which the jury should have resolved these issues was destroyed by the needless introduction of gruesome evidence, the prosecutor's inflammatory argument regarding said evidence, the prosecutor's improperly establishing that O'Neal had previously killed a person by shooting him in the head with his revolver, and by the prosecutor's improperly suggesting that the previous killing was credible evidence that O'Neal was guilty of Podborny's murder. Additionally, the prosecutor intentionally deprived O'Neal of jurors of his own race to help determine his guilt. We find it impossible to conclude that these factors "pale into relative insignificance" in the face of the record evidence of O'Neal's guilt. . . .

> For all these reasons, we conclude O'Neal did not receive a fair trial.

Magistrate's Report and Recommendation (J.A. 160-62) (citation omitted).

Third, the Sixth Circuit unfairly ignored the above evidence that did not neatly fit within the State's theory of O'Neal's guilt as a principal, but did fit within the State's alternative theory that O'Neal could be convicted as an aider and abettor lacking any intent to kill. The Sixth Circuit ignored the very evidence to which the prosecutor pointedly referred in his comments inviting the jury to convict O'Neal whether or not he intended the

victim to be killed. (Tr. 6075-76) (J.A. 58-59.)[12] As stated by the Magistrate:

> The jury was left with the impression that the State did not have to prove beyond a reasonable doubt an independent intent to commit each crime so long as it proved that each defendant was in some way involved in a conspiracy that eventually led to kidnapping, robbery, and murder.

Magistrate's Report and Recommendation (J.A. 130.)

Fourth, the Sixth Circuit also failed to consider how the wide range of errors and prosecutorial misconduct at O'Neal's trial made the jury prone to use the defective instructions to convict O'Neal.[13] The prosecutor did not seek to have the jury methodically and rationally evaluate the testimony and evidence. Instead, the prosecutor intentionally introduced evidence of an unrelated shooting and pleaded to the emotions and passions of the jurors through gruesome evidence. (J.A. 150-51, 209-10.) The Magistrate recognized that the prosecutor deliberately sought to have the jury abandon its impartiality in weighing the evidence:

> The prosecutor's improper conduct in eliciting the details of O'Neal's killing another man was calculated, highly prejudicial and extensive. *See Id.* at 30-39 [J.A. 139-50]. The introduction of gruesome evidence, coupled with the prosecutor's inflammatory remarks regarding such evidence, was also prejudicial and was done for the

[12] Even though the state identified Toney, Allen, O'Neal and Dimple as principals, (Tr. 6107-08), the jury was instructed on aiding and abetting. (Tr. 6159-61) (J.A. 170-71.)

[13] O'Neal's prosecutor has also engaged in misconduct in other cases. *See* Brief of *Amici Curiae* The National and Ohio Associations of Criminal Defense Lawyers In Support Of Petitioner, 7 n.1.

> express purpose of inflaming the jury's passions. *See id.* at 28-30, 39-40 [J.A. 135-39, 148-51]. It is likely that these errors, which were effectively endorsed by the trial judge, caused the jury to abandon its impartiality in weighing the evidence. Although the evidence against O'Neal was substantial, it was not overwhelming and there were substantial credibility issues for the jury to resolve. *Id.* at 47-48 [J.A. 159-61]. Accordingly, we conclude that the prosecutor's misconduct and the erroneous admission of inflammatory evidence, taken as a whole and within the context of the entire record, deprived O'Neal of a fundamentally fair trial.

Supplemental Report and Recommendation (J.A. 209-10.)

Finally, the appellate court did not consider that the defective, unconstitutional jury instructions and the prosecutor's improper argument confused the jury. After deliberating for some time, the jury asked, "Can we please have a brief definition on the laws of aggravated murder?" (Tr. 6207-08) (J.A. 77.) In reply, the trial court compounded the error by repeating the constitutionally defective intent instructions. (Tr. 6208-15) (J.A. 77-82.) As a result, the jury, emotionally disposed against O'Neal by the prosecutor's intentionally inflammatory tactics, decided O'Neal's fate without the proper legal tools to complete its task.

With a fair allocation of the burden of proof to the State, O'Neal is entitled to habeas relief because the defective jury instructions, coupled with the prosecutorial misconduct, did have a substantial and injurious effect on the jury verdict.

CONCLUSION

For the foregoing reasons, Petitioner Robert O'Neal requests the judgment of the United States Court of Appeals for the Sixth Circuit be reversed and his case remanded to that court to determine whether or not the State can demonstrate that the constitutional errors were harmless.

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RULES

Federal Rule of Criminal Procedure 52 provides:

"(a) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

"(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

RULE 2, RULES GOVERNING § 2254 CASES

Rule 2. Petition

(a) Applicants in present custody. If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent.

(b) Applicants subject to future custody. If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.

(c) Form of petition. The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The

petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

(d) Petition to be directed to judgments of one court only. A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.

(e) Return of insufficient petition. If a petition received by the clerk of the district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the petition.

RULE 4, RULES GOVERNING § 2254 CASES

Rule 4. Preliminary Consideration by Judge

The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.

RULE 5, RULES GOVERNING § 2254 CASES

Rule 5. Answer; Contents

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or other in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

STATUTES

Ohio Revised Code, Section 2903.01 – Aggravated Murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violated this section is guilty of aggravated murder and shall be punished as provided in section 2929.02 of the Revised Code.

Ohio Revised Code Section 2905.01 – Kidnapping

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent by any means, shall remove another from the place where he is found or restrain him of his liberty, for any of the following reasons:

(1) To hold for ransom, or as a shield or hostage;

(2) To facilitate the commission of any felony or flight thereafter;

(3) To terrorize, or to inflict serious physical harm on the victim or another;

(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against his will;

(5) To hinder, impede, or obstruct a function of government, or to force action or concession on the part of governmental authority.

* * *

(C) Whoever violates this section is guilty of kidnapping, a felony of the first degree. If the offender releases the victim in a safe place unharmed, kidnapping is a felony of the second degree.

Ohio Revised Code Section 2911.01 – Aggravated Robbery

(A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control;

(2) Inflict, or attempt to inflict serious physical harm on another.

(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

28 U.S.C. § 391

(Repealed)

On the hearing of any appeal, certiorari, writ of error, or motion for new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

---

28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

---

28 U.S.C. § 2111

§ 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

---

28 U.S.C. § 2243

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the fats set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

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28 U.S.C. § 2254

§ 2254. State custody; remedies in State courts:

(a) "[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." . . .

Supreme Court, U.S.
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NO. 93-7407

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROBERT O'NEAL,

Petitioner,

v.

FRED McANINCH, WARDEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

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QUESTIONS PRESENTED

I. ON FEDERAL HABEAS REVIEW OF A STATE CONVICTION, WHICH PARTY HAS THE BURDEN OF PROVING THAT ANY ERROR IDENTIFIED BY THE HABEAS PETITIONER "HAD SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT" UNDER *BRECHT v. ABRAHAMSON*, 113 S. Ct. 1710 (1993)?

II. DID THE ERRORS PETITIONER ALLEGES TO HAVE OCCURRED IN THIS CASE HAVE A "SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT" SUCH AS TO ENTITLE HIM TO FEDERAL HABEAS RELIEF FROM HIS STATE CONVICTIONS FOR AGGRAVATED MURDER, KIDNAPPING, AND AGGRAVATED ROBBERY?

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STATUTORY PROVISION AND RULES INVOLVED

The statutory provision and rules involved -- 28 U.S.C. §2254; capital rule 11, 28 U.S.C. foll. §2254; Fed. R. Civ. P. 61 -- are set forth in full in the capital appendix.

STATEMENT OF THE CASE

On October 10, 1981, a jury convicted Petitioner Robert O'Neal of aggravated murder, kidnapping, and aggravated robbery, and he was sentenced to life in prison. The convictions resulted from Petitioner's actions undertaken as part of "a detailed conspiracy" to kidnap, rob, and murder Henry Podborny. *O'Neal v. Morris*, 3 F.3d 143, 144 (6th Cir. 1993).

After the conspirators had considered a number of plots over a period of several months with Petitioner's full involvement, they determined to lure Henry to Cleveland from his home in Chicago, where Petitioner would kidnap him and hold him in the basement of his unlicensed saloon while his co-conspirators robbed Henry's home and business. Tr. 1807, 1818, 1820, 1851; J.A. 9-13. Henry arrived in Cleveland on January 29, 1981, and was driven to Petitioner's saloon. As prearranged with Petitioner, the driver then waited down the block until, a few minutes later, Petitioner and a fellow conspirator met her and Petitioner gave her Henry's personal belongings. Henry was never seen alive again. Tr. 1858-59; J.A. 13-15, 107-09.

Petitioner and three others were arrested in March of 1981. Petitioner received *Miranda* warnings and then made a statement implicating himself in the kidnapping and robbery, but denying that he had murdered Henry. Tr. 4464-65; J.A. 42-43. On April 2, 1981, Petitioner was visited at the jail by a friend. Henry's body had not yet been

found, but Petitioner told his friend that he and another man had killed Henry and had placed the body in a covering in the field next to the friend's apartment building. Petitioner asked his friend to cover up the body to prevent it from being discovered. The friend did not comply with this request, but a few weeks later accompanied a city health inspector, who was responding to complaints of a stench in the area, to the field where Henry's body was finally found on April 24, 1981. Tr. 3724-28; J.A. 27-32, 109-111.

It was undisputed that Henry's death was caused by five blows on the head with a blunt instrument and a .38 caliber bullet to the head. Tr. 3708, 3710-13, 3984-85; J.A. 35-36. Just weeks before Henry was killed, Petitioner had recovered a .38 caliber gun that had been confiscated from him previously after an incident in which he shot and killed another man; the evidence showed that this revolver was one of only six kinds of weapon that could have fired the bullet that killed Henry. Tr. 3984-85, 4051, 4845; J.A. 35-37, 44-45.

Petitioner was tried jointly with two of his co-conspirators in state court and convicted of aggravated murder, kidnapping, and aggravated robbery. The evidence of his guilt included:

1. Testimony by the co-conspirator who had driven Henry to Petitioner's saloon. She testified that Petitioner had been actively involved in the plot, that after she left Henry with him, Petitioner had emerged and given her Petitioner's personal effects, and that Petitioner continuously sought to extort money from her over the next two months for his supposedly keeping charge of Henry. Tr. 1855-59; J.A. 156.

2. Testimony by a police officer that Petitioner and a co-conspirator both told him they had been present when Henry arrived at the saloon and confirmed that Petitioner had left the saloon minutes later with Henry's personal effects. Tr. 4446, 4464-65; J.A. 156.

3. Testimony by Petitioner's friend that Petitioner told him where Henry's body was located weeks before it was found there, and asked for his help in concealing the corpse. This testimony also placed Petitioner and a co-conspirator a mere twelve feet from that spot earlier in the winter, and related how Petitioner had lied in order to induce the friend to leave that location. Tr. 3730-33; J.A. 159.

4. Physical evidence, including blood and paint samples, linked Henry's body to Petitioner's saloon, where Henry concededly was killed. In addition, Henry's body was found wrapped in a green covering similar to one that was missing from the pool table from Petitioner's saloon. When Henry's body was found, he had been dead for many weeks. Tr. 3653, 3665, 3676-78, 3684-86, 3693, 3701, 3712, 5841; J.A. 23-27, 157.

5. Petitioner testified and recounted how he had used money obtained from his co-conspirators to recover his .38 caliber gun. (The gun had been confiscated after an incident in which Petitioner killed another man, though charges were dropped after Petitioner's friends claimed that the killing was unintentional.) He described his meetings with the co-conspirators as "social occasions," denounced their testimony as "damn lies," and claimed that the police had lied about his statements and roughed him up, though he later contradicted the latter claim. Petitioner's theory of the crimes was that the others had kidnapped and killed Henry in Petitioner's saloon without his knowledge. Tr. 4863-65, 4872, 4892, 4908, 4911-12, 4917-18, 4926, 5840-43; J.A. 45-51, 160-61.

Petitioner was sentenced to life in prison for aggravated murder, and to consecutive terms of 7-25 years each for kidnapping and aggravated robbery.

Petitioner appealed his conviction, claiming among other things that the trial court's instructions to the jury on complicity and conspiracy had deprived him of a fair trial. On July 25, 1985, a state appeals court affirmed, rejecting Petitioner's claims and holding that the challenged instructions were in accord with Ohio law. J.A. 83-98. The Ohio Supreme Court denied leave to appeal on January 29, 1986.

Petitioner then sought a writ of habeas corpus pursuant to 28 U.S.C. §2254. He raised five grounds for relief, including the claim that even though all the evidence adduced at trial tended to demonstrate his guilt as a principal in the murder of Henry Podborny, he was denied due process of law by jury instructions and continued reference to the intent necessary to convict an aider and abettor.

The actual jury instructions properly noted that aggravated murder "is the killing of another purposely and with prior calculation and design." J.A. 169; *O'Neal*, 3 F.3d at 147 n.3. They also properly instructed, as held in *State v. Scott*, 61 Ohio St. 2d 155, 165 (1980), and *State v. Lockett*, 49 Ohio St. 2d 48, 59-60 (1976), *rev'd on other grounds sub nom. Lockett v. Ohio*, 438 U.S. 586 (1978), that under Ohio criminal law:

> ... where you have an unlawful act contemplated in the original conspiracy, although not identical with or similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was performed was reasonable or [sic; reasonably] likely to produce the

> death of another, then each conspirator, or aider and abettor is equally guilty as the principal offender of the homicide.

J.A. 170. The jury instructions given on the other charges were similarly proper. Petitioner contended that the instructions may have confused the jury into finding him guilty without finding intent or mens rea because one further passage said that the jury must find "there was present in the minds of the defendants or co-defendants or aiders and abettors, if you so find, a specific intention to kill the decedent." J.A. 170.

A federal magistrate agreed with Petitioner's claim and recommended that the writ be granted. J.A. 123-31. The magistrate also held that Petitioner had been denied a fair trial because relevant evidence had been admitted that was unduly prejudicial and cumulative, J.A. 132-39, a determination no longer at issue here. In so ruling, the magistrate stated that error could not be harmless unless the entire record revealed overwhelming evidence of guilt. J.A. 155, 160. On June 26, 1992, the magistrate's report was adopted by the district court. J.A. 213-14.

On appeal, the Sixth Circuit unanimously reversed. *O'Neal v. Morris*, 3 F.3d 143 (6th Cir. 1993). It held, first, that the challenged jury instructions were not erroneous:

> ... when read against the backdrop of Ohio complicity law, the court's reference to "defendants or co-defendants or aiders and abettors" appears to be nothing more than an unartful boilerplate reiteration that the same individuals could be found guilty *either* as principals ("defendants or co-defendants") or as "aiders and abettors."

Id. at 146; *see also id.* at 146-47 (instruction, though "not ideal," nonetheless "captured the essence of how a jury might properly infer an aider and abettor or conspirator's purpose to kill as explained by the Ohio Supreme Court").

The court went on, however, to consider whether these instructions, combined with improper comments made by the prosecutor in closing argument, warranted habeas relief.[1] The court simply assumed, *arguendo*, that error had occurred, but found that any such errors "were not of such magnitude that they 'had [a] substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 147 (*quoting Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993)). Although Petitioner contended that the alleged errors might have caused the jury to find him guilty as an accomplice or conspirator without finding intent, the actual instructions, coupled with "all of the evidence upon which the jury could have relied to establish petitioner's guilt pointed to his guilt as a principal." 3 F.3d at 147 & n.3. The Sixth Circuit therefore denied habeas relief.

Rehearing was denied, and this Court granted certiorari on April 4, 1994. Although Petitioner had raised the issue of whether *Chapman v. California*, 386 U.S. 18 (1967) should be applied in this case rather than *Brecht*, the Court limited its grant of certiorari to the issue of which side bears the burden of proof under *Brecht* in cases brought on federal habeas review. *See O'Neal v. McAninch*, 114 S. Ct. 1396 (1994); Petition for Writ of Certiorari at 6-9.

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[1] The prosecutor's statement in closing argument was that the State must prove two things: "First, the crimes alleged have been committed.... The next thing we're bound to prove to you is that those accused of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes." J.A. 58.

SUMMARY OF ARGUMENT

1. The Court has recently held that on federal habeas review of state convictions, the proper standard for determining whether any alleged error should result in reversal of the petitioner's state conviction is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). The Court thus adopted a standard that had been in existence for decades. *See Kotteakos v. United States*, 328 U.S. 750 (1946). In explicating that standard, the Court stated in *Brecht* that the burden of showing that an alleged error "had substantial and injurious effect or influence in determining the jury's verdict" so as to warrant reversal rests upon the habeas petitioner. This formulation of the proper standard on collateral review has generally been applied without difficulty by the lower courts, and has been recognized and considered also by the Congress.

2. The Court's formulation in *Brecht* of the standard for determining when alleged errors warrant reversal of a judgment is consistent with the historical background of appellate review in the federal courts. The ordinary formulation places upon the party seeking to reverse a judgment the burden of demonstrating that any errors alleged to have occurred are of sufficient magnitude to justify reversal. This formulation of the standard of review is faithful to the general tenor of decisions both before and after *Kotteakos*. The sole exception to this general approach has been the distinct standard of review adopted from *Chapman v. California*, 386 U.S. 18 (1967), which the Court in *Brecht* explicitly rejected for federal habeas proceedings.

3. The *Brecht* standard for determining when alleged errors warrant reversal of a judgment is especially

appropriate on federal habeas review of state convictions under 28 U.S.C. §2254.

a. Habeas corpus actions brought under 28 U.S.C. §2254 are civil actions, as the Court has long recognized. But the established approach to harmless-error review in civil actions, under *Kotteakos* and similar cases, is that the party seeking to reverse a judgment bears the burden of demonstrating that any errors alleged to have occurred are of sufficient magnitude to justify reversal. This is the approach taken under Federal Civil Rule 61, in particular, which is made applicable to federal habeas actions by Rule 11 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. §2254, and thus governs this case.

b. In addition, as the Court has emphasized in *Brecht* and many other cases, finality concerns, special considerations of comity, and the social costs of belated retrials are all implicated by collateral habeas review, especially by federal challenges to state convictions. *See Engle v. Isaac*, 456 U.S. 107 (1982); *United States v. Frady*, 456 U.S. 152 (1982). These special problems justify the Court's view that a habeas petitioner must clear a significantly higher hurdle than would exist on direct appeal, consistent with the central interest in assuring the reliability of the criminal process. This sensible distinction is faithfully captured in the differences between the *Chapman* and *Brecht* standards, including their respective allocations of the burden of showing that alleged errors have had a sufficient effect on the jury's verdict to justify reversal of a presumptively valid conviction.

c. At the same time, the specific safeguards noted in *Brecht* -- including application of the *Chapman* standard on direct appeal, the requisite careful examination of the whole record on collateral review, and faithful application of

the *Kotteakos* formulation rather than a simplistic assessment of probable guilt -- suffice to protect the traditional role fulfilled by the writ of habeas corpus.

4. In this case, for example, the errors alleged by Petitioner here are the combined effects of a challenged jury instruction and a comment made by the prosecutor during closing argument. These alleged errors are said to have confused the jury about whether it had to find that Petitioner had intent to commit the crimes charged in order to convict him. Yet faithful application of the *Kotteakos* standard on review of the full record shows that Petitioner's convictions should be affirmed. In view of the evidence at trial, the theory of the case presented by the prosecution, the complete set of instructions given to the jury, and the likely minimal effect of any arguably improper comment set against the full record here, it appears that any alleged error would not have had "substantial and injurious effect or influence in determining the jury's verdict."

ARGUMENT

I. UNDER *BRECHT v. ABRAHAMSON*, THE BURDEN OF PROVING THAT ALLEGED ERROR "HAD SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT" RESTS UPON THE HABEAS PETITIONER

In *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), the Court addressed the question of how the courts should determine in federal habeas proceedings when alleged error warrants reversal of a state conviction. In resolving this issue, the Court chose between *Chapman v. California*, 386 U.S. 18 (1967), which imposes a less stringent standard to justify reversal and places the burden of proof upon the

State, and *Kotteakos v. United States*, 328 U.S. 750 (1946), which imposes a more stringent standard and places the burden on the party seeking to set aside a conviction. In opting for the latter, the Court exercised its traditional authority to fill gaps in federal habeas law by adopting an approach consistent with the view that a habeas petitioner must clear a significantly higher hurdle than exists on direct review.

A. The Court's Decision in *Brecht*

In *Brecht*, the Court considered and determined what standard of review should apply "in determining whether habeas relief must be granted because of constitutional error of the trial type." 113 S. Ct. at 1722. In *Brecht* the Court confronted this issue in the particular context of allegedly erroneous references by the prosecutor to the defendant's post-*Miranda* silence, *see Doyle v. Ohio*, 426 U.S. 610 (1976); *Miranda v. Arizona*, 384 U.S. 436 (1966), but the Court's holding was not so limited. Instead, the Court spoke generally in addressing and resolving the broader theoretical issue of when a habeas petitioner establishes an entitlement to relief based on claims of trial error.

The Court noted that it had applied the approach set forth in *Chapman* "in a handful of federal habeas cases," but had yet "squarely to address its applicability on collateral review." 113 S. Ct. at 1718. Under the *Chapman* standard, a valid claim of federal constitutional error mandates reversal of the underlying conviction unless it is shown to be "'harmless beyond a reasonable doubt,'" and that standard requires the State to bear the burden of proof to make the necessary showing. *Id.* at 1717 (*quoting Chapman*, 386 U.S. at 24). The *Chapman* standard has generally been applied to evaluate the effect upon the verdict of constitutional claims raised on direct review of criminal cases in both the state and

federal courts. *See, e.g., Chapman; United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985).

In *Brecht*, however, the Court rejected application of the *Chapman* standard to constitutional trial errors raised in federal habeas proceedings. The Court noted that it was obliged to exercise its traditional authority to fill "the gaps of the habeas corpus statutes." 113 S. Ct. at 1719. In doing so, the Court emphasized, in particular, the settled "principle that collateral review is different from direct review," *id.*, and noted that "the writ of habeas corpus has historically been regarded as an extraordinary remedy." *Id.* (*citing Engle v. Isaac*, 456 U.S. 107, 126 (1982)). The States have a strong interest "in the finality of convictions that have survived direct review within the state court system," and serious concerns of comity and federalism arise also with collateral federal habeas review of state judgments, which fosters and often requires relitigation of state criminal trials many years after the underlying events have faded from memory. 113 S. Ct. at 1720-21. Thus, the Court decided that it would be sensible to recognize that "'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'" *Id.* at 1720 (*quoting United States v. Frady*, 456 U.S. 152, 165 (1982)) (internal quote omitted).[2]

The Court implemented these concerns by adopting instead a "less onerous standard on habeas review of constitutional error," which it determined should be the *Kotteakos* test of "whether the error 'had substantial and injurious effect or influence in determining the jury's

[2] The Court observed also that "in an unusual case, a deliberate and egregious error of the trial type" could warrant reversal without more. *Brecht*, 113 S. Ct. at 1722 n.9. No such deliberate and unusually egregious error is alleged or exists in this case.

verdict.'" 113 S. Ct. at 1722 (*quoting Kotteakos*, 328 U.S. at 776). The Court recognized that up to this point, "we have limited [the *Kotteakos* standard's] application to claims of nonconstitutional error," but determined nonetheless that it should now be held to apply to claims of constitutional trial error that are raised on collateral habeas review. 113 S. Ct. at 1718, 1722.

In explaining this approach, the Court stated: "Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" 113 S. Ct. at 1722 (*citing United States v. Lane*, 474 U.S. 438, 449 (1986)) (emphasis added). This statement clearly imposes the burden of proof upon the habeas petitioner to show that alleged error had substantial and injurious effect in determining the jury's adverse verdict. *See also* 113 S. Ct. at 1727 (White, J., dissenting) ("the Court now invokes *Kotteakos* ... to impose on the defendant the burden of establishing that the error "'resulted in actual prejudice'"). In addition, the Court noted that "because the *Kotteakos* standard is grounded in the federal harmless-error rule (28 U.S.C. §2111), federal courts may turn to an existing body of case law in applying it." *Id.* at 1722.

Applying that standard, the Court examined "the record as a whole" and determined that the petitioner was not entitled to habeas relief. 113 S. Ct. at 1722. The alleged error was found to be incidental and cumulative in light of the complete trial record, the evidence of guilt "was, if not overwhelming, certainly weighty," and so it appeared that the alleged error would not have had "substantial and injurious effect or influence in determining the jury's verdict." *Id.*

Petitioner has suggested here that the formulation of the *Chapman* standard rejected in *Brecht* can somehow be separated from its subsidiary determination of which party bears the burden of proof under that standard, and that in *Brecht* the Court departed only from the former but not the latter. Brief for Petitioner at 17. The suggestion is incorrect. It is clear from *Brecht* and from *Chapman* itself that the formulation of the *Chapman* standard includes, and cannot be divorced from, an understanding under that standard about which party bears the burden of proof. Thus the claim that the Court's references in *Brecht* to the *Chapman* "standard" have nothing to do with the intertwined concept of where that standard allocates the burden of proof is incorrect. It also cannot be squared with the passage quoted above, in which the Court expressly provided that under the *Kotteakos* standard, the habeas petitioner bears the burden of establishing an entitlement to the relief sought. 113 S. Ct. at 1722. Justice White, in dissent, expressed the same understanding of how the Court's adoption of the *Kotteakos* standard resolved the burden-of-proof issue. *See id.* at 1727 (White, J., dissenting).

In a separate concurrence, Justice Stevens offered several observations about the *Kotteakos* standard. "Of particular importance, the statutory command requires the reviewing court to evaluate the error in the context of the entire trial record." 113 S. Ct. at 1724 (Stevens, J., concurring). Moreover, under *Kotteakos*, the relevant inquiry is not whether the jury's verdict was correct, but instead whether it was substantially influenced by the alleged error. *Id.* He also cautioned the lower courts that "the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied." *Id.* at 1725.

Justice Stevens also stated his view, however, that unless errors are merely "technical" in nature, the prosecution must

bear the burden of sustaining a verdict, rather than the habeas petitioner bearing the burden of showing an entitlement to relief. He read *Kotteakos* as providing that the issue of whether error is merely technical turns on whether it can be shown that the effect of the error "'is to prejudice a litigant's substantial rights.'" 113 S. Ct. at 1723 (Stevens, J., concurring) (*quoting Kotteakos*, 328 U.S. at 760-61). Yet Justice Stevens did not believe that *Kotteakos* would require the complaining party to make any such showing with respect to the kinds of trial errors raised in federal habeas proceedings. In Justice Stevens' view, for example, constitutional errors always tend to prejudice a litigant's substantial rights, and thus the burden of proof would fall upon the prosecution, without regard to whether the errors alleged were "trial errors" or not. 113 S. Ct. at 1723-24. This view thus might appear to import some portion of a *Chapman*-type analysis into the *Kotteakos* framework.[3] None of the dissenters appeared to subscribe to this approach. *See id.* at 1727 (White, J., dissenting) (petitioner bears burden of proof under the *Kotteakos* standard); *id.* at 1731 (O'Connor, J., dissenting) (expressing no view on the burden-of-proof issue).

B. Subsequent Application of *Brecht* by the Courts and the Congressional Response

For the most part, the lower federal courts have faithfully applied *Brecht* to place the burden on the habeas petitioner to

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[3] In contrast, Justice White noted in dissent that the trend in the Court's recent cases has been to categorize errors in habeas proceedings only for the purpose of distinguishing between "trial errors" subject to review for prejudice to the petitioner's substantial rights and "structural defects" that necessitate reversal by presuming such effect. *Brecht*, 113 S. Ct. at 1727 n.* (White, J., dissenting) (*citing Arizona v. Fulminante*, 499 U.S. 279 (1991)).

prove that alleged error had "substantial or injurious effect or influence on the jury's verdict." 113 S. Ct. at 1718. Although some courts have ignored *Brecht*'s express statement on the burden-of-proof issue,[4] most have had no difficulty understanding or applying *Brecht*, and thus the fair administration of the *Brecht* approach provides no cause to abandon or rewrite it at this juncture.

For example, in *Jeffries v. Blodgett*, 5 F.3d 1180 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1294 (1994), the court considered a claim of alleged juror misconduct during a state criminal trial. Finding error, the court then applied the new *Brecht* standard to determine whether habeas relief was warranted, which it viewed as requiring petitioners to bear the burden of proof. "Although petitioners now face a greater burden, it would be wrong to assume that federal collateral review has lost much of its force." *Id.* at 1190. The court conducted a careful review of the record as prescribed in *Brecht*, and vacated and remanded to the trial court. *Id.* at 1190-91.

In *Robinson v. Arvonio*, 1994 U.S. App. LEXIS 14683 (3d Cir. June 15, 1994), by contrast, the court denied habeas relief based on *Brecht*. There the court found error in the introduction of some perjured testimony, but determined that the error did not have substantial effect on the jury's verdict. It considered the circumstances surrounding the error, canvassed the record to determine what the jury knew and how that knowledge might have been affected by the testimony, and assessed the further effect of tactical

[4] Even in the few cases that have not applied *Brecht*'s allocation of the burden of proof, it does not appear that the result has hinged on that point, whether relief was granted or denied. *Ortiz v. Dubois*, 19 F.3d 708, 715 (1st Cir. 1994); *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993); *Lowery v. Collins*, 996 F.2d 770, 772 (5th Cir. 1993).

maneuvers engaged in by the prosecution and defense counsel. *Id.* at *19-*30. *See also Bibbins v. Dalsheim*, 21 F.3d 13, 16 (2d Cir. 1994); *Smith v. Dixon*, 14 F.3d 956, 975 (4th Cir. 1994) (en banc).[5]

Finally, in *Cumbie v. Singletary*, 991 F.2d 715 (11th Cir.), *cert. denied*, 114 S. Ct. 650 (1993), the court also applied the new *Brecht* rule "applicable to federal habeas corpus cases alleging state court trial error," including its allocation of the burden of proof to the petitioner. *Id.* at 724. Having found that the petitioner's confrontation rights were violated, the court went on to assess the evidence presented in the case and to hold that actual prejudice was established. It thus granted a new trial on charges of sexually assaulting a child. *See also Henry v. Estelle*, 993 F.2d 1423, 1426-28 (9th Cir. 1993) (applying *Brecht* standard and burden of proof; writ granted).

These cases are exemplary of the approach taken by the lower courts in the wake of *Brecht*. The more specific and confined nature of the *Kotteakos* inquiry has improved the sharpness of the courts' analysis and has given clearer guidance about what is important in assessing the effects of alleged error.[6] It is significant in this connection that the

[5] Surprisingly, although amicus Timothy Scott Sherman states his interest in preserving favorable law in the Fourth Circuit, where his case is pending, he does not mention the contrary *en banc* ruling in *Dixon*. All of the judges currently active on the full court joined in its holding on the *Brecht* burden-of-proof issue; one senior judge dissented.

[6] In this respect, the more focused nature of the inquiry under *Brecht* and *Kotteakos*, directed as it is to the effect or influence of alleged error on the jury's verdict, would seem better to serve the concerns stated by Justice O'Connor in dissent in *Brecht*, that the applicable standard should advance "our faith in the reliability of the criminal process." 113 S. Ct. at 1728-29 (O'Connor, J., dissenting).

lower courts are closely heeding two of the cautionary admonitions that Justice Stevens laid down in his *Brecht* concurrence:

> (1) that courts must engage in a careful and "*de novo* examination" of the "entire trial record" to determine whether alleged error "had substantial and injurious effect" on the verdict;
>
> (2) that the proper inquiry is not whether the evidence tends to show that the petitioner committed the crime, or even whether the court "thinks the petitioner would have been convicted" without the alleged error, but instead whether such error did or did not "influence the jury" in reaching its verdict.

113 S. Ct. at 1724 (Stevens, J., concurring). *See also, e.g., Burks v. Borg*, 1994 U.S. App. LEXIS 16019 (9th Cir. June 27, 1994); *Tague v. Richards*, 3 F.3d 1133, 1140 (7th Cir. 1993). The *Brecht* standard, therefore -- including its allocation of the burden of proof to the habeas petitioner to show that alleged error warrants reversal of the conviction -- is operating well in practice and does not require reworking at this point.

Likewise, the Congress has expressed a clear understanding that under *Brecht*, the burden of demonstrating that alleged error warrants reversal of a state conviction rests upon the habeas petitioner. Three bills have been introduced that would expressly amend the language of 28 U.S.C. §2254(a) to overturn *Brecht*'s holding on this point and assign the burden of proof to the State. *See* S. 1441, 103d Cong., 1st Sess. §4(b) (1993) ("the State shall bear the burden of proving harmlessness"); S. 1657, 103d Cong., 1st Sess. §304(b) (1993) (same); H.R. 4018, 103d Cong., 2d Sess. §8 (1994) (court shall award relief unless "the

respondent shows that the error was harmless beyond a reasonable doubt"). The Congress, of course, can certainly exercise its power to lay down a different rule by legislation, and should be permitted the opportunity to consider whether to do so.

To date, however, none of these proposals has been enacted, and the sense of the Congress appears instead to be that habeas law does not require any dramatic overhaul at the moment.[7] The House bill, sponsored by Representative Edwards, was voted out of committee earlier this year, but has not yet proceeded any further. The House Judiciary Committee report on H.R. 4018 confirms that the bill is not designed as a clarification or codification of *Brecht*, but instead to "restor[e] the traditional framework" as it existed prior to *Brecht*. H.R. Rep. No. 470, 103d Cong., 2d Sess. 14 (1994); *see also id.* at 29 (dissenting views of minority members) (purpose of proposed bill is to "overtur[n]" *Brecht*). The *Brecht* holding, once again, is described as providing that habeas relief should be denied "unless the petitioner can show that the error 'had a substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* (*quoting Brecht*, 113 S. Ct. at 1718).

The argument here is *not* that the Court should infer from Congress' failure to act that it has somehow expressed its affirmative approval of the *Brecht* approach. *Cf. Brecht*, 113 S. Ct. at 1719. Instead, the point is simply that Congress has demonstrated its own recognition that this approach --

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[7] Considerable discussion occurred earlier in the session about including various components of habeas reform in the omnibus crime bill that is currently pending in conference committee. Upon further consideration, however, the leadership in both parties concluded that no measures affecting habeas corpus law should be included in that legislation, and no such provisions are contained in that pending proposal.

including its allocation of the burden of proof -- does govern in habeas actions, and Congress should be given a reasonable opportunity to assess the effects of that approach before deciding whether to legislate any change.

Unless the Court were to overrule *Brecht*, therefore, there is no obvious reason for this Court to abandon its conclusion about which party bears the burden of proof in federal habeas proceedings.[8] The burden properly rests on a habeas petitioner, seeking to overturn a presumptively valid state conviction, to show that any alleged error warrants reversal on collateral habeas review.

II. UNDER THE *KOTTEAKOS* TEST ADOPTED IN *BRECHT*, THE BURDEN OF PROVING THAT ALLEGED ERROR "HAD SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT" RESTS UPON THE PARTY SEEKING TO SET ASIDE THE JUDGMENT ON APPELLATE REVIEW

In *Brecht*, the Court noted that it was adopting the *Kotteakos* test in part because "federal courts may turn to an existing body of case law in applying it." 113 S. Ct. at 1722. Petitioner is studiously silent, however, on what that body of case law says about the issue raised in this case, other than to place emphasis on the now irrelevant criterion of how this inquiry was previously handled under the *Chapman* approach, which was expressly rejected in *Brecht*.

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[8] Many of the arguments marshalled by Petitioner here really go to the antecedent issue of whether the *Kotteakos* standard is proper on collateral habeas review at all, which was already determined in *Brecht*; they thus tend to be a reprise of the arguments made and rejected by the petitioner in *Brecht*. *Compare, e.g.*, Brief for Petitioner at 12-13, 15-19, 37-39 *with Brecht*, 113 S. Ct. at 1716.

Brief for Petitioner at 15-19.[9] When the background and progeny of *Kotteakos* are examined closely, however, the rectitude of the burden-of-proof holding in *Brecht* is established even more plainly.

A. The Historical Background to Federal Appellate Review of Trial Judgments

The history of appellate review leading up to *Kotteakos* evinces a long struggle between the legislatures and the courts over when errors alleged to have occurred at trial should be understood to warrant relief from an otherwise valid judgment. In the English criminal courts, the "doctrine of presumed prejudice" was first announced "in that most technical of courts, the Court of Exchequer, about 1835," and was adopted more widely in the decades thereafter, including in this country. Edson R. Sunderland, *The Problem of Appellate Review*, 5 Tex. L. Rev. 126, 147 (1927), cited in *Kotteakos*, 328 U.S. at 759 n.12. This "paralyzing rule" was abolished in England in 1873 by the Judicature Act, with the result that in the King's Bench Division only very rare cases were reversed for error. *Id.* It was attacked much more slowly in this country, however, and "in the federal courts it continued to obstruct the administration of justice until 1919, when Congress abolished it by an act," which corresponds to the current 28 U.S.C. §2111. *Id.*[10] The common-law approach to reversing

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[9] Instead, Petitioner engages in an unwarranted attack on "two decades worth of [unnamed] decisions of this Court" addressing various habeas issues, an attack that does not merit any response here. Brief for Petitioner at 35.

[10] The statute as enacted in 1919 was codified at 28 U.S.C. §391, *see Kotteakos*, 328 U.S. at 757, and has since been repealed and reenacted as section 2111, with the omission of the adjective "technical" to describe more broadly the errors it addresses. *See Brecht*, 113 S. Ct. at 1718 n.7.

judgments on appeal thus was sharply repudiated both in England and in the United States by statutory enactment.

There is good reason to believe, moreover, that the more exacting approach taken in England was never well suited here, since it evolved as a humanitarian response to a harsh criminal law without procedural protections:

> In 1821, the French Government sent a distinguished lawyer, M. Cottu, to England, to study their criminal system. He reported that the English penal law was written in letters of blood, that nearly every offense presumed the death of the offender. Consequently there had arisen a "humane conspiracy" between judges, lawyers, juries, rules of practice and procedure to defeat the law and to acquit the prisoner.
>
> . . . .
>
> The existence of that "humane conspiracy" never found the slightest justification in America. Our penalties were never severe nor our forms of trial unfavorable to the prisoner.

Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A.J. 217, 220 (1925), cited in *Kotteakos*, 328 U.S. at 759 n.13. Thus the enactment of a repudiating federal statute in 1919, and the adoption of similar measures in many of the States, was long overdue. Even so, while "some of [that discredited system] has been taken away by statutes, yet the courts of this country have still in themselves much of that ancient, inherent power necessary to effect this reform." *Id.*

The federal courts implemented this statute with fidelity to its main purpose, and thus the decisional law reflected a new refusal to presume prejudice from alleged error.

Instead, the courts put the burden on criminal appellants to demonstrate that alleged error had affected their substantial rights. As one court summarized in a case involving alleged error in admitting certain evidence, defendants were now obligated by law to bear this burden:

> From recent legislation [citation] we gather the congressional intent to end the practice of holding that an error requires the reversal of the judgment unless the opponent can affirmatively demonstrate from other parts of the record that the error was harmless, and now *to demand that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right* whereby he has been prevented from having a fair trial.

Haywood v. United States, 268 F. 795, 798 (7th Cir. 1920) (emphasis added), *cert. denied*, 256 U.S. 689 (1921). *See also Armstrong v. United States*, 16 F.2d 62, 64 (9th Cir. 1926) (rejecting claimed error in admitting evidence alleged to have been unlawfully seized because defendant "has not shown that he was denied a 'substantial right'"), *cert. denied*, 273 U.S. 766 (1927).

In a later case involving alleged errors in the cross-examination and jury instructions, the court similarly noted the change that had been wrought by the 1919 statute: "Under the law as now declared, 'the former practice of holding an error reversible unless the opposite party can affirmatively demonstrate it was harmless is changed, and *the burden now is on the complaining party to show from the record as a whole the denial of some substantial right.*'" *Morgan v. United States*, 98 F.2d 473, 477 (8th Cir.) (emphasis added) (quoting and citing numerous decisions), *cert. denied*, 305 U.S. 648 (1938). *See also Valli v. United*

States, 94 F.2d 687, 690 (1st Cir.) (rejecting claim of error in admitting evidence allegedly obtained by illegal wiretap because "defendants have failed to sustain" their burden of showing that their "substantial rights were affected by the introduction of this evidence"), *cert. dismissed*, 304 U.S. 586 (1938).

The Supreme Court also addressed the effect of the statute in a decision that was relied on by the Court in *Kotteakos* itself. *See Kotteakos*, 328 U.S. at 756-57. In *Berger v. United States*, 295 U.S. 78 (1935), the Court confronted a situation where a variance in proof occurred between the defendant's indictment and conviction. The Court noted that under the 1919 statute, the question was whether the variance was great enough to "'affect the substantial rights' of the accused." *Id.* at 82. The Court explained:

> Evidently Congress intended by the amendment to section 269 [now 28 U.S.C. §2111] to put an end to the too rigid application, sometimes made, of the rule that error being shown, prejudice must be presumed; and to establish the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless.

Id. (*citing with approval Haywood, supra; Rich, supra*).

Yet another decision correctly noted the true breadth of the federal statute, which applies not only to criminal cases but to civil cases as well. In *Shuman v. United States*, 16 F.2d 457 (5th Cir. 1927), the court held that any error that might have arisen from a challenged jury instruction did not have any prejudicial effect upon the defendant, who was convicted of receiving stolen property. The court put its

ruling on the basis of the federal statute: "It has been held that this statute casts the burden upon the plaintiff in error [appellant], in either a civil or criminal case, of showing prejudicial error from the whole record." *Id.* at 458.

This asserted breadth of the federal statute was confirmed by the Supreme Court in *Palmer v. Hoffman*, 318 U.S. 109 (1943), a civil case that stemmed from a railroad accident. The appealing party contended that an evidentiary ruling by the trial court constituted reversible error. The Court stated that it did not need to determine whether the ruling was error, because in any event it had not been shown to have affected the complainant's substantial rights. *Id.* at 116. In so concluding, the Court cited the federal statute (then 28 U.S.C. §391) and held that *it imposed the burden of proof upon the complaining party*: "He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. That burden has not been maintained by petitioners." *Id.*

Moreover, just three years before *Kotteakos* itself was decided, and in the same year as *Palmer*, the Supreme Court decided a pair of cases on habeas review in which the burden of showing a violation of substantial rights was squarely placed upon the habeas petitioner. In *Adams v. United States*, 317 U.S. 269 (1943), the Court rejected a claim that the defendant was entitled to habeas relief because his jury trial rights had been violated in his federal trial. The Court said, through Justice Frankfurter: "If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality." *Id.* at 281. A few months later, in a case that arose on federal habeas review of a state conviction for alleged error in

prosecutorial comment, the Court denied relief, quoting this same statement. *Buchalter v. New York*, 319 U.S. 427, 431 (1943).

Thus, far from there being an established history prior to *Kotteakos* that the government bears the burden of proof on the issue of whether alleged error affected substantial rights, the main thrust of the actual decisional law is to the contrary. The older and overly fastidious common-law tradition was directly overridden in 1919 by the new federal statute, and the courts faithfully applied that statute in civil and criminal cases alike. Under this new approach, in both civil and criminal cases, the courts required parties seeking to set aside judgments on appeal to show that alleged error had affected their substantial rights before granting them any relief.

B. The Decision and Rationale in *Kotteakos*

In *Kotteakos* itself, the Court construed the federal statute, then codified at 28 U.S.C. §391, in determining what standard of review should be applied on appeal to claims of error. The essence of the *Kotteakos* test, as adopted by the Court in *Brecht*, required a determination of whether "the error had substantial and injurious effect or influence in determining the jury's verdict." 328 U.S. at 776.[11]

The Court reached this conclusion by applying the plain terms of the federal statute, which then provided: "On the

[11] *Kotteakos* also answers a further question that could be raised about application of this standard as adopted in *Brecht* -- what degree of confidence must a court have that the standard as formulated has been met. In *Kotteakos*, the Court concluded that it was "highly probable" that alleged error had such "substantial and injurious effect" on the jury's verdict. 328 U.S. at 776.

hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." *Kotteakos*, 328 U.S. at 757. By its terms, the statute thus was framed in the affirmative, dictating that alleged error was to be disregarded unless it was demonstrated to have "affect[ed] the substantial rights of the parties." This phrasing comported with the purpose of the statute, as described above, which was to rid the courts of the presumption that alleged error should lead to reversal of otherwise valid judgments. Or, as the Court paraphrased the statute, it "comes down on its face to a very plain admonition: 'Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects.'" *Id.* at 760.

In arriving at this approach, the Court in *Kotteakos* referred also to the legislative history underlying the federal statute. It quoted from the congressional committee report that the purpose of the bill "in its final form was stated authoritatively to be 'to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be disregarded.'" 328 U.S. at 760 (*quoting* H.R. Rep. No. 913, 65th Cong., 3d Sess. 1 (1946)). This same purpose is shown even more clearly on the next page of the same committee report, where the report compares two inconsistent Supreme Court decisions in civil cases on the burden-of-proof issue. The report strongly states that this burden is to be borne by the party seeking to set aside the judgment below:

> "In other words, in the first of these cases the Supreme Court holds that an error is presumed to be

> prejudicial until the contrary appears, and in the second that an error is presumed to be harmless until the contrary is made to appear. It is the purpose of the first section of the present bill to enact, in so far as the appellate courts are concerned, that in the consideration in an appellate court of a writ of error or an appeal judgment shall be rendered upon the merits without permitting reversals for technical defects in the procedure below and without presuming that any error which may appear had been of necessity prejudicial to the complaining party."

H.R. Rep. No. 913, *supra*, at 2 (*quoting* H.R. Rep. No. 611, 62d Cong., 2d Sess. 2 (1912)).

This statement captures the essence of the effect of the federal statute. It also accords with statements in the committee reports that accompanied the first version of the same proposed statute, which quoted from an article by President Taft: "'No judgment of the court below should be reversed except for an error which the court, after hearing the entire evidence, can affirmatively say would have led to a different result.'" H.R. Rep. No. 1949, 61st Cong., 3d Sess. 1 (1911) (*quoting* William Howard Taft, *The Administration of Criminal Law*, 15 Yale L.J. 1, 16 (1905)). Similarly, the description of this measure given earlier by the Chairman of the Senate Judiciary Committee, Senator Elihu Root, stated that it was designed "to provide that a judgment or decree shall not be reversed for error which does not do a substantial injury to the complaining party." 48 Cong. Rec. 11,770 (1912).

The Court in *Kotteakos* also drew from the legislative history the suggestion that two different categories of rights might be alleged as error under this statute. One category of error is of such a character that its natural effect may or may

not be "to prejudice a litigant's substantial rights." For such errors, described by the Court as "technical," the burden falls upon the complaining party to show that the result of the error was to affect "his substantial rights." 328 U.S. at 760 (*quoting* H.R. Rep. No. 913, *supra*). A second category of error comprises those where the "natural effect is to prejudice a litigant's substantial rights." For these errors, the "burden of sustaining a verdict" would rest upon the opposing party "notwithstanding this legislation." *Id.*[12]

A question posed by Justice Stevens in his concurrence in *Brecht* concerns the kinds of error that are properly understood to fall in these two categories identified in *Kotteakos*, as applied on federal habeas review. As the Court noted in *Brecht*, the term "technical" was subsequently deleted from the statute, as it now appears at 28 U.S.C. §2111.[13] 113 S. Ct. at 1718 n.7. Thus there remains no ground under the statute, if any ever existed, to hold that these categories should be understood to correspond, respectively, to "hypertechnical" errors as opposed to "ordinary" errors. Instead, if these two categories are to be carried forward at all, they would appear to correspond most sensibly to the two categories of error the Court has discussed extensively in recent cases: "trial errors," which are subject to harmless error analysis, and "structural

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[12] As Justice Brennan later characterized the same materials: "The theme that reversal be limited to prejudicial errors is found throughout the legislative history." *United States v. Lane*, 474 U.S. 438, 458 (1986) (Brennan, J., concurring and dissenting in part).

[13] The statute now reads, more simply: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. §2111. It thus remains phrased in the affirmative, that courts are to disregard alleged error unless it affects "substantial rights."

defects," which require reversal of the conviction if they are established by the defendant and not dispelled by the government. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 306-10 (1991); *see also Brecht*, 113 S. Ct. at 1722; *cf. id.* at 1723 (Stevens, J., concurring).[14]

The remainder of the Court's opinion in *Kotteakos* consists of a thoughtful and extensive exposition of how reviewing courts should approach the task of determining whether alleged error had a "substantial and injurious effect" on the jury's verdict. The distinction between stepping into the jury's shoes to assess guilt and deciding whether the jury's verdict was affected by alleged error is carefully explained. The duty to make this assessment in view of the entire trial record, as specifically enjoined by the statute, is also explored. 328 U.S. at 761-66. That the determination is emphatically for a court to make in the exercise of its own judgment, taking account of whatever may be shown and said on the subject by both parties to the case, is also made plain. *Id.* The *Kotteakos* decision, as a result, has been extensively cited for its guidance on the question of how courts should carry out their duty to assess whether alleged error warrants reversal of an otherwise valid judgment.

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[14] In *Brecht*, Justice Stevens suggested that all constitutional errors must be assessed under *Kotteakos* with the government bearing the burden of proof. 113 S. Ct. at 1723-24 (Stevens, J., concurring). Of course, constitutional errors historically have not been subject to such analysis under *Kotteakos*, since the courts have applied the *Chapman* standard to them instead on direct review. *See id.* at 1718 (majority opinion). Thus, the issue raised in *Brecht* required the Court to exercise judgment in determining how best to fill "the gaps of the habeas corpus statute" by determining "whether the proposed rule would advance or inhibit" the "considerations underlying our habeas jurisprudence." *Id.* at 1719. And it was the Court's assessment of these considerations in *Brecht* that caused it to reject the *Chapman* standard for cases on habeas review.

C. Subsequent Application of *Kotteakos*

The courts have since applied *Kotteakos* in accordance with this historical understanding of the consequences of the federal statute now codified at 28 U.S.C. 2111.

In the wake of *Kotteakos*, courts continued to understand that the federal statute put the burden on the appealing party to show that alleged error affected his substantial rights in order to justify reversal. *See, e.g., Baker v. United States*, 156 F.2d 386, 389 (5th Cir.), *cert. denied*, 329 U.S. 763 (1946); *Myres v. United States*, 174 F.2d 329, 332 (8th Cir.), *cert. denied*, 338 U.S. 849 (1949); *Pulley v. United States*, 253 F.2d 796, 798 (8th Cir. 1958); *United States v. Montoya*, 827 F.2d 143, 154 (7th Cir. 1987). One court put this approach in context of the maxim "Omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium" -- that all things are presumed to have been rightly and duly done until the contrary is proved. *Wells v. United States*, 158 F.2d 932, 935 (5th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947). In many other cases, the courts performed their careful examination of whether claims of error affected substantial rights, as required by the statute, without discussing which party bore the burden of proof under *Kotteakos*.

In *United States v. Lane*, 474 U.S. 438 (1986), the Court confirmed this approach. Addressing alleged error involving improper joinder of defendants, the Court found that any such error would not require reversal of the conviction unless it were shown that it had "any 'substantial influence' on the verdict." *Id.* at 450 (*quoting Kotteakos*, 328 U.S. at 765). "Invoking the *Kotteakos* test, we hold that an error involving misjoinder 'affects substantial rights' and requires reversal only if the misjoinder results in actual prejudice because it 'had substantial and injurious effect or influence in

determining the jury's verdict.'" *Id.* at 449 (*quoting Kotteakos*, 328 U.S. at 776). Undertaking this analysis, the Court concluded that the claimed error did not justify reversal of the conviction. *Id.; see also id.* at 459 (Brennan, J., concurring and dissenting in part) ("We held instead [in *Kotteakos*] that the Act's command to disregard errors unless they 'affect the substantial rights of the parties' was a command not to overturn a conviction unless, after examining the record as a whole, the court concludes that an error may have had 'substantial influence' on the outcome of the proceeding").

In civil cases, the proposition that the statute imposes the burden on the complaining party to show that alleged error has affected substantial rights is widely accepted. In *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984), the Court observed that "[w]e have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered 'citadels of technicality.'" *Id.* at 553 (*quoting Kotteakos*, 328 U.S. at 759) (internal quote omitted). The federal statute embodies the principle that courts should "ignore errors that do not affect the essential fairness of the trial." *Id.* (*citing Kotteakos*, 328 U.S. at 759-60). In *McDonough*, therefore, the Court reversed an order granting a new trial and held that the complaining party should be required to demonstrate that an error that arose on voir dire actually affected its substantial rights. 464 U.S. at 555-556.

The same application of section 2111 has been made in numerous other civil cases. *See, e.g., Erskine v. Consolidated Rail Corp.*, 814 F.2d 266, 272 (6th Cir. 1987) (appealing party must show he was prejudiced by alleged error); *Gilliam v. City of Omaha*, 524 F.2d 1013, 1015 (8th Cir. 1975) (error not reversible where objecting party did not show it affected substantial rights); *Cunningham v. Mitchell*,

374 F.2d 356, 359 (5th Cir. 1967) (same); *Andrews v. Olin Mathieson Chem. Corp.*, 334 F.2d 422, 428 (8th Cir. 1964) (same); *Segal v. Cook*, 329 F.2d 278, 280 (6th Cir. 1964) (same).

The case law thus again demonstrates that before and after *Kotteakos*, in both criminal and civil cases, the courts generally have understood the federal statute now codified at 28 U.S.C. §2111 as being consistent with *Brecht* on the burden-of-proof issue. The courts thus have interpreted and applied the statute as directing them to place upon the party seeking reversal the burden of showing that alleged error had such a substantial and injurious effect on the jury's verdict as to justify setting aside the judgment.

III. THE *KOTTEAKOS* TEST ADOPTED IN *BRECHT* IS APPROPRIATE ON COLLATERAL FEDERAL REVIEW OF STATE JUDGMENTS BECAUSE IT REQUIRES THE HABEAS PETITIONER TO SHOW THAT ALLEGED ERROR JUSTIFIES REVERSAL OF THE CONVICTION

In *Brecht*, the Court stressed that the *Kotteakos* standard, including its allocation of the burden of proof to the party seeking to set aside the judgment, was better suited to federal habeas review than the more demanding *Chapman* approach. 113 S. Ct. at 1718-22. This is true for reasons that arise from the specific nature of federal habeas corpus actions involving collateral review of state convictions under 28 U.S.C. §2254. In such proceedings, it is proper that a habeas petitioner bear the burden of proof to establish that alleged error affected his substantial rights in order to justify reversal of his conviction.

A. Habeas Corpus Review Under Section 2254 Occurs in a Civil Action and Thus It Is Proper for Petitioner to Bear the Burden of Showing that the Conviction Warrants Reversal

One reason why the burden of proof must be borne by the petitioner on federal habeas review under *Brecht* is that such review occurs in a civil proceeding. Actions brought under 28 U.S.C. §2254 have long been recognized as civil in nature, even though they involve collateral review of state criminal convictions. *See, e.g., Fisher v. Baker*, 203 U.S. 174, 181 (1906); *Browder v. Director, Ill. Dep't of Corrections*, 434 U.S. 257, 269 (1978); *cf. Teague v. Lane*, 489 U.S. 288, 308-09 (1989) (citing civil cases on retroactivity issue). And in civil actions brought in the federal courts, perhaps even more clearly than in criminal cases, the burden of proof to show that alleged error warrants setting aside an otherwise valid judgment rests upon the complaining party. *See Palmer v. Hoffman*, 318 U.S. at 116; *see also* Sections IIA & IIC, *supra* (citing cases).

In *Harris v. Nelson*, 394 U.S. 286 (1969), the Court considered the extent to which federal habeas corpus proceedings, as civil actions, are governed by the Federal Rules of Civil Procedure. In that case, a state prisoner sought to use the instrument of interrogatories for discovery purposes in his habeas lawsuit. The Court held that under the version of the Federal Civil Rules in effect at that time,[15]

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[15] At the time of the *Harris* decision, Federal Civil Rule 81(a)(2) provided that the Civil Rules were not applicable in habeas corpus actions except where they "heretofore conformed to the practice in actions at law or suits in equity." 394 U.S. at 292-93. During the pendency of that case, Rule 81 was amended to frame the matter in the affirmative -- (continued...)

it lay within the trial court's discretion to decide what procedures should be extended in such cases to allow development of the facts relevant to disposition of the habeas petition. *Id.* at 292-300.

After *Harris* was decided, this Court proposed new rules to govern habeas proceedings brought in the federal courts under 28 U.S.C. §2254. Those rules were approved as amended by the Congress and became effective February 1, 1977. Under these rules specific to habeas cases brought under section 2254, the "Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these [section 2254] rules, may be applied, when appropriate, to petitions filed under these rules." Rule 11 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. §2254. This rule has been construed to require the federal courts to follow the Federal Rules of Civil Procedure in disposing of habeas corpus petitions, absent some specific provision to the contrary. *See, e.g., Browder*, 434 U.S. at 269-71 (rejecting contention that Federal Civil Rules do not apply on habeas and holding specifically that Civil Rules 52 and 59 are applicable); *McDonnell v. Estelle*, 666 F.2d 246, 249 (5th Cir. 1982) (applying Civil Rules 12 and 56). *See also Frady*, 456 U.S. at 183 (Brennan, J., dissenting) (noting that section 2254 rules authorize courts to apply Federal Civil Rules in such cases).[16]

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[15](...continued)
"These rules are applicable to proceedings for ... habeas corpus" -- though the Court in *Harris* noted that this change was not intended to be one of substance. 394 U.S. at 293 n.3.

[16] In his *Frady* dissent, Justice Brennan noted that the section 2254 rules differ from the section 2255 rules in that the former specifically provide that section 2254 cases are to be governed by the Federal Civil Rules only, whereas the latter permit application of either the Federal (continued...)

Under Federal Civil Rule 61, however, "no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict ... or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice." Rule 61 goes on to direct the courts, in language similar to 28 U.S.C. §2111, that they "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." *Id.* The Court has previously held that Rule 61 applies not only to federal trial courts, but that "it is well settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61." *McDonough*, 464 U.S. at 554.

In civil cases, the federal courts have clearly held that the party seeking to invalidate a judgment bears the burden of proving that alleged error affected his substantial rights such as to justify reversal. *See, e.g., Howard v. Gonzales*, 658 F.2d 352, 357 (5th Cir. 1981) ("party asserting error has the burden of proving that 'substantial rights' were affected" by the error; *citing Kotteakos*); *Flanigan v. Burlington Northern Inc.*, 632 F.2d 880, 889 (8th Cir. 1980) (same; jury instruction), *cert. denied*, 450 U.S. 921 (1981); *Westwood Chem., Inc. v. Owens-Corning Fiberglas Corp.*, 445 F.2d 911, 918 (6th Cir. 1971) (same), *cert. denied*, 405 U.S. 917 (1972); *Creekmore v. Crossno*, 259 F.2d 697, 698 (10th Cir.

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[16](...continued)
Civil Rules or the Federal Criminal Rules in section 2255 cases. 456 U.S. at 182-83 (Brennan, J., dissenting). For this reason, the dictum in *United States v. Olano*, 113 S. Ct. 1770 (1993), concerning harmless-error analysis under Federal Criminal Rule 52, does not apply in cases like *Brecht* and the instant case. In addition, it does not apply because the Court has explicitly refused to apply Federal Criminal Rule 52 to cases brought on collateral habeas review. *See Frady*, 456 U.S. at 163-66 (majority opinion).

1958) (same; *citing Palmer v. Hoffman*). Thus, even if *Brecht* is construed as having held merely that the *content* of the *Kotteakos* standard is to be applied on federal habeas review -- divorced from any determination of the proper allocation of the burden of proof--the proper approach in cases brought under section 2254 is to require the complaining party to bear the burden of proof in accordance with Federal Civil Rule 61.

The more general point here, of course, is that since habeas proceedings under section 2254 are civil actions, it is natural for the plaintiff in such actions to bear the burden of proof on all the issues that must be shown in order to prove his claim. This approach has been taken in numerous decisions. *See, e.g., Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). In particular, however, it is appropriate for the habeas petitioner to bear this burden under the longstanding principle that the party "who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." *Palmer*, 318 U.S. at 116; *see also Kotteakos*, 328 U.S. at 776.

B. The Nature and Purpose of Collateral Habeas Corpus Review Warrants the Application of Different Rules than on Direct Review

Even more important, the nature of federal habeas actions brought under section 2254 is that they involve collateral federal review of state convictions. As the Court emphasized in *Brecht*, as well as in many other decisions, these proceedings raise special concerns that justify the application of different rules and procedures than may obtain on direct review. This point, indeed, was the foundation of the Court's determination in *Brecht* that the *Kotteakos* standard

should apply on collateral habeas review rather than the *Chapman* standard that applies on direct review. That judgment is sound, and it also dictates that the burden of proof under this standard is properly borne by the petitioner on collateral habeas review.

That the burden of proof rests upon the petitioner in habeas actions follows most logically from the fact that the petitioner is attacking "the judgment of a court," which "carries with it a presumption of regularity." *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) ("burden of proof rests upon [petitioner] to establish that he did not" waive right to counsel); *see also Hawk v. Olson*, 326 U.S. 271, 279 (1945) ("Petitioner carries the burden in a collateral attack on a judgment."). "The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system." *Brecht*, 113 S. Ct. at 1720. *See also* Larry W. Yackle, *Postconviction Remedies* §133, at 502-03 (1981) ("the moving party in collateral proceedings of any stripe bears the burden of showing an entitlement to relief" because presumption of regularity attaches to criminal convictions affirmed on direct review).

This finality interest goes not only to the deterrent effect of the criminal laws, *see, e.g., Teague*, 489 U.S. at 309, but also to the prospect that a convicted defendant will be willing to undertake rehabilitation, *see, e.g., Engle v. Isaac*, 456 U.S. at 127 n.32. As the late Professor Bator eloquently described in a famous article on habeas review:

> I suggest that finality may be a crucial element of this effectiveness [of the substantive commands of the criminal law]. Surely it is essential to the educational and deterrent functions of the criminal law that we be

> able to say that one violating the law will swiftly and certainly become subject to punishment, just punishment.... Furthermore, we should at least tentatively inquire whether an endless reopening of convictions, with its continuing underlying implication that perhaps the defendant can escape from corrective sanctions after all, can be consistent with the aim of rehabilitating offenders. The first step in achieving that aim may be a realization by the convict that he is justly subject to sanction that he stands in need of rehabilitation....

Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452 (1963) (quoted in *Engle*, 456 U.S. at 127 n.32); *see also Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting).

In addition, inroads on finality tend to foster a general disrespect for the legal system and to undermine confidence in its efficacy, which is undesirable. *See, e.g., Addonizio v. United States*, 442 U.S. 178, 184-85 (1979). As Judge Friendly commented:

> The proverbial man from Mars would surely think we must consider our system of criminal justice terribly bad if we are willing to tolerate such efforts at undoing judgments of conviction. He would be surprised, I should suppose, to be told both that it never was really bad and that it has been steadily improving .... His surprise would mount when he learned that collateral attack on a criminal conviction by a court of general jurisdiction is almost unknown in the country that gave us the writ of habeas corpus and has been long admired for its fair treatment of accused persons.

Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 145 (1970) (quoted in *Engle*, 456 U.S. at 126 n.31).

To take account of these concerns about the finality of state judgments, the Court has held that it is appropriate to apply different rules on collateral review than apply on direct review. Indeed, the standards applied on direct review may be simply "out of place when a prisoner launches a collateral attack against a criminal conviction after society's legitimate interest in the finality of the judgment has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal." *Frady*, 456 U.S. at 164.

Similarly, the Court has stressed that comity and federalism concerns arise with habeas petitions brought under section 2254. "'The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Brecht*, 113 S. Ct. at 1720 (*quoting Engle*, 456 U.S. at 128). And "nowhere has a 'proper respect for state functions' been more essential to our federal system than in the administration of criminal justice." *Younger v. Harris*, 401 U.S. 37, 44 (1971). These concerns provide further reason to apply different rules in such cases than would be applied on direct review.

Finally, the application of rules that encourage more liberal allowance of the writ on collateral review "degrades the prominence of the trial itself," *Engle*, 456 U.S. at 127, and reduces it from its proper place in the justice process as the "'main event' and not a 'tryout on the road' for what will

later be the determinative federal ... hearing." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). It also imposes concomitant costs upon society because belated orders granting new trials are often tantamount to outright reversals:

> We must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution.

Engle, 456 U.S. at 127-28; *see also United States v. Mechanik*, 475 U.S. 66, 72 (1986).[17]

For these reasons, "'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'" *Frady*, 456 U.S. at 165 (*quoting Addonizio*, 442 U.S. at 184). Yet these concerns are best addressed in collateral habeas corpus actions by adhering to the *Brecht* approach, which differentiates between direct and collateral review in determining the question of whether alleged error "had substantial and injurious effect" on the jury's verdict. "Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless

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[17] Interestingly enough, the same point was made on the floor of the Senate during one of the early debates on the proposal that became the predecessor statute to 28 U.S.C. §2111: "When the cases are disposed of by a jury and by a judge and substantial justice has been accorded they should not be reopened and protracted until the evidence is dissipated and the witnesses are dead, and the most flagrant criminals, in many instances, go unwhipped of justice." 48 Cong. Rec. 11,774 (1912) (statement of Sen. Poindexter).

they can establish that it resulted in 'actual prejudice.'" *Brecht*, 113 S. Ct. at 1722.

Considered from a somewhat different standpoint, the *Kotteakos* standard -- including its allocation of the burden of proof to the habeas petitioner -- is again the appropriate approach in cases like this one which involve alleged trial error. In a number of cases, Justice O'Connor has stated her view that "the central goal of the criminal justice system [is] accurate determinations of guilt and innocence," *Brecht*, 113 S. Ct. at 1729 (O'Connor, J., dissenting), and thus the principal focus on federal habeas review of state convictions should be to assure "the reliability of the criminal process," *id.* at 1728-29. The dispositive issue can thus be framed as whether alleged error "actually affected the reliability of the trial," *id.* at 1730, or, to put it another way, whether alleged error "may have caused the conviction of an actually innocent person," *id.* at 1729. *See also Withrow v. Williams*, 113 S. Ct. 1745, 1757 (1993) (O'Connor, J., concurring and dissenting in part) ("ultimate equity on the prisoner's side" is "a sufficient showing of actual innocence"); *Engle*, 456 U.S. at 132 (legal principles "must yield to the imperative of correcting a fundamentally unjust incarceration").

This interest in assuring the reliability of the criminal process is directly advanced by application of the *Kotteakos* standard on collateral habeas review. That standard, once again, requires a reviewing court to consider whether alleged error -- here constitutional trial error -- "had substantial or injurious effect or influence in determining the jury's verdict." *Brecht*, 113 S. Ct. at 1714, 1716, 1722. If such error cannot be shown, after careful review of the entire trial record, to have had any such "effect or influence in determining the jury's verdict," then the reliability of the criminal process will not be served by reversing the conviction. If no such showing can be made, then there can

be no serious apprehension that the alleged trial error "caused the conviction of an actually innocent person." *Id.* at 1729 (O'Connor, J., dissenting).[18]

Habeas relief would not be warranted in such instances because they reveal no "extreme malfunctions in the state criminal justice system" that have "grievously wronged" the petitioner. 113 S. Ct. at 1730 (O'Connor, J., dissenting). To require more would be to repudiate all confidence in the ability of state courts in good faith "to honor constitutional rights." *Engle*, 456 U.S. at 128. This is especially true, moreover, as the habeas petitioner already will have had one or more full and fair opportunities to relitigate his claims in the state courts, with the State obliged to satisfy the more stringent *Chapman* standard in order to uphold the conviction on direct review.[19]

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[18] Instead, the granting of habeas relief many years after conviction -- here, *fourteen* years -- in such circumstances will, if anything, be viewed as a "stroke of lightning" bearing no relation to the jury's verdict and having no effect upon state policy, prosecutorial conduct, or judicial practice. *Duckworth v. Eagan*, 492 U.S. 195, 211 (1989) (O'Connor, J., concurring).

[19] Petitioner's contention that the *Brecht* standard, including its allocation of the burden of proof, collapses into the same "cause and prejudice" standard that is applied in cases of procedural default or abuse of the writ is truly bizarre. Brief for Petitioner at 39-42. The "cause and prejudice" standard is emphatically framed in the conjunctive, and requires a habeas petitioner to show not only that some "external impediment" has prevented him from raising a claim previously, *Murray v. Carrier*, 477 U.S. 478, 494 (1986), but that alleged error "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions," *Frady*, 456 U.S. at 170. Needless to say, this standard is much more exacting than the *Kotteakos* approach adopted in *Brecht*.

Thus, the *Brecht* approach -- including its allocation of the burden of proof to the habeas petitioner to show that alleged error "had substantial and injurious effect" on the jury's verdict -- is proper here.[20] It will be met by petitioners who can satisfy any of the following criteria: (1) show alleged trial error that had "substantial and injurious effect or influence in determining the jury's verdict"; (2) show a "structural defect" of the kind that undermines the very integrity of the trial proceedings; or (3) show actual innocence. This approach is in harmony both with the aim of assuring "the reliability of the criminal process," *Brecht*, 113 S. Ct. at 1728-29 (O'Connor, J., dissenting), and with "the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal," *Frady*, 456 U.S. at 166.

C. The Traditional Safeguards Noted in *Brecht* Suffice to Protect the Historical Role Fulfilled by the Writ of Habeas Corpus

It bears emphasis, once again, that the issue of which party bears the burden of proof in applying the *Brecht* standard on cases of collateral habeas review is accompanied by other specific procedural protections emphasized by Justice Stevens in his *Brecht* concurrence. These features of the *Kotteakos* test substantially protect the interests of the party seeking to set aside a presumptively valid judgment.

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[20] *See also* Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* §13.10, at 13-59 (2d ed. 1992) ("burden of proof [on harmless error issue] is on the prisoner-petitioner to show that but for the alleged error, she would not have been convicted"); *id.* at 13-60 ("In habeas actions, by statute, the burden rests upon the petitioner to show that the error was conspicuously prejudicial.").

First, the petitioner already will have had the opportunity to have all claims considered under the more stringent *Chapman* standard on direct review. "State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error." *Brecht*, 113 S. Ct. at 1721. The performance of this duty by the state courts on direct appeal, along with the possibility of review by this Court, is a significant safeguard.

Second, and of "particular importance," the *Brecht* standard requires the federal courts assessing habeas claims on collateral review to consider alleged error "in the context of the entire trial record." 113 S. Ct. at 1724 (Stevens, J., concurring). In so doing, the federal courts are held to the responsibility of making a *de novo* examination of the trial record to determine the effect of the alleged error, as the Court did in *Brecht* itself. *Id.* The lower courts appear to have been responsive to this admonition as now reiterated in *Brecht*. *See* Part IB, *supra* (citing cases).[21]

Third, *Brecht* reminds the lower courts that they are to apply the *Kotteakos* standard in accordance with its emphasis on determining what effect the alleged error had upon the jury. They thus are obliged to do more than make a simplistic assessment of probable guilt. 113 S. Ct. at 1724 (Stevens, J., concurring). Evidence of the petitioner's guilt

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[21] The post-*Brecht* decisional law also belies Petitioner's contention that application of the *Brecht* standard will complicate the resolution of claims and impose greater burdens on the courts. Brief for Petitioner at 36-38. On the contrary, the duty imposed on the courts is precisely what it was before *Brecht*: to assess the validity of claims raised in the context of the entire trial record, as both parties presumably present their most persuasive reasons why the reviewing court should hold in their favor.

remains very relevant, certainly, because "weighty" evidence of guilt would tend to suggest that alleged error did not have "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 1722 (majority opinion). But the reviewing court's role is to exercise careful judgment in accordance with the standard as formulated in *Kotteakos* and adopted in *Brecht*, rather than seeking to usurp the jury's proper role.

These protections amply suffice to vindicate the historical role fulfilled by the writ of habeas corpus. But the application of the *Kotteakos* standard on habeas review is also consonant with those same principles, as is allocation of the burden of proof to the petitioner who seeks to set aside a presumptively valid state conviction on collateral review.

IV. THE ERRORS ALLEGED BY PETITIONER IN THIS CASE DID NOT HAVE "SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT" SO AS TO ENTITLE HIM TO FEDERAL HABEAS RELIEF FROM HIS STATE CONVICTIONS

In this case, the court below determined that the errors alleged by Petitioner, even assuming *arguendo* that they "could be said to have abridged petitioner's constitutional rights," were not "of such magnitude that they 'had [a] substantial and injurious effect or influence in determining the jury's verdict.'" *O'Neal*, 3 F.3d at 147 (*quoting Brecht*, 113 S. Ct. at 1722). This statement, which represents the court's considered judgment on this issue in the context of the entire trial record, is not framed in such a way as to be dependent upon the allocation of the burden of proof. Be that as it may, however, the court's conclusion is also correct on the record here.

The court below noted that the actual instructions given to the jury at Petitioner's trial were in accord with prevailing Ohio criminal law and thus did not constitute error. 3 F.3d at 147 n.2 (here "the jury charge provided an adequate statement of the way an aider and abettor's intent may be inf- .ed in Ohio"). In particular, the court applied the controlling standard laid down in recent cases to hold that "petitioner has not demonstrated a reasonable likelihood that the jury interpreted the instructions, taken as a whole, to permit petitioner's conviction without proof that he himself had the requisite intent to kill." *Id.* at 147; *see Estelle v. McGuire*, 112 S. Ct. 475, 482 & n.4 (1991); *Boyde v. California*, 494 U.S. 370, 380 (1990).[22] Consequently, the court did not engage in a *Brecht* analysis on the issue of the jury instructions alone.

Instead, the court went on to consider whether the jury instructions, taken in combination with an improper comment made by the prosecutor in closing argument, violated Petitioner's constitutional rights. The narrow proposition considered by the court was whether their cumulative effect would have so confused the jury about whether a finding of intent was needed to convict Petitioner as to have "'substantial and injurious effect or influence in determining the jury's verdict.'" 3 F.3d at 147 (*quoting Brecht*, 113 S.

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[22] Petitioner contended that one isolated passage in the jury instructions, which described the necessity of finding specific intent "in the mind of the defendants or co-defendants or aiders and abettors, if you so find," would have misled the jury into concluding that it did not have to find specific intent in order to return a conviction on the charges against Petitioner. The court saw this passage as "nothing more than an unartful boilerplate repetition that the same individuals could be found guilty *either* as principals ('defendants or co-defendants') or as 'aiders and abettors,'" especially in view of three different statements in the instructions that the jury had to find the elements of each crime separately for each defendant. *O'Neal*, 3 F.3d at 146.

Ct. at 1722). The court held that even assuming, *arguendo*, that Petitioner's assertions amounted to trial error, any such error "did not injuriously influence the jury's decision to convict petitioner as a principal." 3 F.3d at 147.

The court reached the correct conclusion under the *Brecht* standard. Although Petitioner continues to press his claim in this Court that the alleged errors relieved the State "of the burden of proving the intent element of each of the crimes charged," Brief for Petitioner at 6-7, a close review of the full record demonstrates that Petitioner is not entitled to habeas relief from his convictions on each of the charges -- aggravated murder, kidnapping, and aggravated robbery.[23]

The court below noted that Petitioner's essential claim is that the jury might have been confused by the alleged errors so as "to find him guilty as an accomplice or conspirator by imputing to him the intent of the principals. However, all of the evidence upon which the jury could have relied to establish petitioner's guilt pointed to his guilt as a principal." 3 F.3d at 147. This was true, first, as to the aggravated robbery charge, for it was exhaustively established at trial that Petitioner exited his saloon with the decedent's personal effects only minutes after the decedent was brought there. It was true, also, as to the kidnapping charge, for the evidence showed that Petitioner helped plan the forcible detention of the decedent, that it occurred at his unlicensed saloon, that

[23] In what may be intended as an attempt to fit this case into the possible exception reserved in *Brecht* for "deliberate and especially egregious error," Petitioner attacks the prosecutor's performance as constituting alleged misconduct. Brief for Petitioner at 47-48. This attack, however, falls far short of making the requisite showing of a failure to preserve that fundamental fairness essential to the very concept of justice, *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-643 (1974), and in any event this issue is not properly before the Court.

he possessed personal effects of the decedent, and that he sought to extort money for allegedly keeping charge of the decedent. J.A. 156.

And this point was true, finally, as to the aggravated murder charge, as the court below specifically observed, for:

> Petitioner and Lloyd Allen were in petitioner's bar when Henry Podborny entered, and petitioner exited his establishment with Podborny's wallet and other possessions just minutes later. One witness testified that petitioner had told him that he and Allen had killed a man and placed his body in the field next to the witness' home, where Podborny's corpse was in fact discovered. In addition, physical evidence admitted at trial tended to show that Podborny was killed in petitioner's bar. Authorities found blood of Podborny's type spattered on the walls of petitioner's saloon and discovered paint on Podborny's body that was similar to the paint in the bar. Finally, the prosecutor consistently portrayed petitioner to the jury as a principal.

3 F.3d at 147. The court could have pointed also to the conceded fact that the decedent was killed at Petitioner's saloon, Tr. 5841; J.A. 157, with a weapon that the evidence related only to Petitioner as among the co-conspirators, Tr. 4863-65, 4872, 4892, 4908, 4911-12, 4917-18, 4926; J.A. 45-51.

A review of the entire record thus clearly shows that Petitioner was presented to the jury strictly as a principal in these events. In addition, the evidence of guilt here "was, if not overwhelming, certainly weighty." *Brecht*, 113 S. Ct. at

1722.[24] Finally, the jury heard Petitioner's own theory of the crimes, which was that the others had kidnapped and killed the decedent in Petitioner's saloon without his knowledge. Tr. 5840-43; J.A. 160-61. This theory of total exoneration was not credible, however, in light of all the evidence that Petitioner was directly involved in the forcible detention of the decedent and was in possession of his personal effects just minutes after the decedent had arrived at Petitioner's saloon. J.A. 156.

Moreover, any potential for jury confusion here was minimal in view of the determination by the court below that the jury instructions viewed as a whole, though perhaps not ideal, were not even erroneous, but instead gave the jury "an adequate statement of the way an aider and abettor's intent may be inferred in Ohio." 3 F.3d at 147 n.2. The Court has cautioned that "the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made," *Boyde*, 494 U.S. at 385, and "the respondent's burden is especially heavy [where] no erroneous instruction was given," *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). The court below was thus correct in concluding that "any error by the trial court pertaining to the intent of conspirators or aiders and abettors did not injuriously influence the jury's decision to convict petitioner as a principal." *O'Neal*, 3 F.3d at 147.

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[24] Again, the point of marshalling such evidence is not to suggest that a reviewing court should seek to supplant the jury's role in determining guilt, but to indicate further that the alleged error "did not 'substantially influence' the jury's verdict." *Brecht*, 113 S. Ct. at 1722.

CONCLUSION

For the foregoing reasons, the Court should continue to allocate the burden of proving that alleged error had substantial and injurious effect in determining the jury's verdict to the habeas petitioner on collateral review. In so ruling, the Court should affirm the judgment of the Sixth Circuit Court of Appeals in this case, which upheld Petitioner's state convictions for aggravated murder, kidnapping, and aggravated robbery.

Respectfully submitted,

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July 15, 1994

APPENDIX

STATUTORY PROVISION AND RULES INVOLVED

(in addition to those set forth in the Brief for Petitioner)

28 U.S.C. Section 2254(a):

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Rule 11 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. §2254:

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

Rule 61 of the Federal Rules of Civil Procedure:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

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In The

Supreme Court of the United States

October Term, 1994

ROBERT O'NEAL,

Petitioner,

vs.

FRED McANINCH, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

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ARGUMENT

I. THE STATE HAS THE BURDEN OF PROVING A CONSTITUTIONAL ERROR HARMLESS IN A FEDERAL HABEAS CORPUS PROCEEDING UNDER *KOTTEAKOS V. UNITED STATES*, THE CONTROLLING STANDARD FOR FEDERAL HABEAS CORPUS HARMLESS ERROR ANALYSIS.

The parties' opening briefs have successfully narrowed the determinative questions before the Court to a single one – the interpretation of identical language in two, or perhaps three, provisions of federal codified law: 28 U.S.C. § 2111, Fed. R. Crim. P. 52(b), and Fed. R. Civ. P. 61. First, the parties agree that this Court's decision in *Kotteakos v. United States*, 328 U.S. 750 (1946), is now authoritative in habeas corpus harmless error analysis, and that *Kotteakos* "is grounded in the federal harmless-error rule (28 U.S.C. § 2111)." *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993). *See* Brief for Respondent at 12. The federal harmless error rule provides:

> **Harmless error**
>
> On the hearing of any . . . case, the court shall give judgment after an examination of the record without regard to errors or defects which *do not affect the substantial rights of the parties* . . .

28 U.S.C. § 2111 (emphasis added).

Second, the parties also agree, *see* Brief for Respondent at 30-31, based on *Brecht*, that the Court's decision in *United States v. Lane*, 474 U.S. 438 (1986), is authoritative in habeas corpus harmless error analysis. *See Brecht*, 113 S. Ct. at 1722 (quoting *Lane*, 474 U.S. at 449). *Lane* addressed the question whether a violation of Fed. R.

Crim. P. 8(b) in the joinder of federal criminal defendants was harmless. *Brecht* cites page 449 of *Lane* where three points are made. To begin with, *Lane* notes that, because the violation arose under the Federal Rules of Criminal Procedure, the harmless error question in the case was controlled by the Rules' own harmless error provision, Fed. R. Crim. P. 52(a). 474 U.S. at 449. Additionally, *Lane* concludes that, given the "similar language" in Rule 52(a) and in the harmless error statute construed in *Kotteakos*, the interpretation of the rule and the statute are coterminous and interchangeable. *Id.* Then, "[i]nvoking the *Kotteakos* test," *Lane* finds the error before the Court to be harmless under Rule 52(a). 474 U.S. at 449, 459. Thus, a second harmless error provision, Fed. R. Crim. P. 52(a), is authoritative here. Rule 52(a) provides:

> HARMLESS ERROR. Any error, defect, irregularity or variance which *does not affect substantial rights should be disregarded.*

(emphasis added).

Finally, Respondent argues that a third harmless error provision, Fed. R. Civ. P. 61, may be authoritative. Brief for Respondent at 35-36. Civil Rule 61 does not help Respondent. That provision is relied upon in neither *Brecht*, *Kotteakos*, *Lane*, nor any other decision with an obvious relation to this case. Furthermore, the issue is not important because Rule 61 adds nothing to the case, given that (as Respondent admits) the rule uses "language similar to 28 U.S.C. § 2111." Brief for Respondent at 35. *See McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (28 U.S.C. § 2111 "incorporates the same principle as that found in Rule 61"). Fed. R. Civ. P. 61 provides:

> HARMLESS ERROR. . . . The court . . . must disregard any error or defect in the proceeding which *does not affect the substantial rights of the parties.*

(emphasis added). By all accounts, therefore, the single determinative question before the Court – the same question addressed by section 2111, Rules 52(a) and 61, and the Court's decisions in *Kotteakos* and *Lane* interpreting those provisions – is, simply, which party bears the burden of proving that the constitutional "errors" in this case "do *not* affect the substantial rights of the parties." 28 U.S.C. § 2111 (emphasis added). *Accord* Fed. R. Crim. P. 52(a) ("error . . . does *not* affect substantial rights" (emphasis added)); Fed. R. Civ. P. 61 ("error . . . does *not* affect the substantial rights of the party" (emphasis added)). The identical language of all these provisions clearly answers that determinative question. The litigant bearing the burden of proof is the one trying to convince the reviewing court that the errors do *not* affect the substantial rights of the parties. That litigant, of course, is the one who has previously been shown to have committed a violation and who is attempting to avoid relief by demonstrating that the violation is *harmless error.* It is noteworthy that "Harmless error" is the title that Congress gave to section 2111 and that the Court gave to Rule 52(a) (and Rule 61) in promulgating the Federal Rules.

One can easily imagine a *differently* worded provision – one that goes by the title of "Harmful" or "Plain Error" – and limits relief to "errors or defects *affecting* substantial rights." Such statutory language would require the moving party to satisfy not one, but *two*, burdens – first to show that a violation occurred, and then to show that

the violation affected substantial rights. The provision that Petitioner O'Neal (hereinafter O'Neal) postulates here is, of course, one which exists in various forms in federal codified law – for example, in the "Plain Error" provision in Fed. R. Crim. P. 52(b), a provision which, as this Court recently noted, "is paired, appropriately, with Rule 52(a), which governs *non-forfeited* errors." *United States v. Olano*, 113 S. Ct. 1770, 1776 (1993) (emphasis added). Rule 52(b) provides:

> PLAIN ERROR. Plain errors or defects *affecting substantial rights* may be noticed although they were not brought to the attention of the court.

(emphasis added). *Accord, e.g.*, Fed. R. Evid. 103(d) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."). Moreover, the differing allocations of the burden of proof postulated above, based on the differing language in the two kinds of provisions, are not O'Neal's invention, but the Court's own interpretation in *Olano*. 113 S. Ct. at 1776. In *Olano*, the Court compared the "Harmless Error" provision in Rule 52(a), which uses the "does not affect substantial rights" formulation, and the "Plain Error" provision in Rule 52(b), which uses the "affecting substantial rights" formulation. The Court began by noting one *similarity* between the two provisions. Both use the same words – referring to the error's influence on "substantial rights" – to define the *standard* of proof:

> This [language from Rule 52(b)] is the same language employed in Rule 52(a), and in most cases it means that the error must have been prejudicial: It must have affected the outcome of the District Court proceedings.

Id. at 1778. This *standard* of proof is the same standard the Court adopted in *Brecht*, both from *Kotteakos* – "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict' " – and from *Lane* – whether the error "resulted in 'actual prejudice.' " *Brecht*, 113 S. Ct. at 1722 (quoting *Kotteakos*, 328 U.S. at 776, and *Lane*, 474 U.S. at 449).

Beyond this similarity in the *standard* of proof, the Court noted an "important difference" in the allocation of the *burden* of proof, which is dictated by the difference in the language ("does not affect" versus "affecting") used in the two types of provisions:

> When the defendant has made a timely objection to an error and Rule 52(a) applies, the Court of Appeals normally engages in a specific analysis of the District Court record – a so-called "harmless error" inquiry – to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, the Court of Appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial. . . . This burden-shifting is dictated by a subtle but important difference in the language between the two parts of Rule 52: while Rule 52(a) precludes error-correction only if the error "does *not* affect substantial rights" (emphasis added), Rule 52(b) authorizes no remedy unless the error *does* "affec[t] substantial rights."

Olano, 113 S. Ct. at 1778. Then, after concluding that the defendants had not met their burden of showing plain error under Rule 52(b)'s "affecting substantial rights" formulation, the Court returned to the distinction between that formulation and the different, "does not affect substantial rights," formulation that the parties agree is dispositive here:

> In sum, respondents have not met their burden of showing prejudice under Rule 52(b). Whether the government could have met *its* burden of showing the absence of prejudice, under Rule 52(a), if respondents had not forfeited their claim of error, is not at issue here. This is a plain-error case, and it is respondents who must persuade the . . . Court that the deviation from Rule 24(c) was prejudicial.

Id. at 1781 (emphasis added).

These and other passages from *Olano* explain why harmless and plain error provisions, using the same "substantial effect" *standard* of proof, allocate the *burden* of proof differently. In the case of a moving party who has made a timely objection, only a single burden of proving the underlying error is imposed. By contrast, in the case of parties who have *forfeited* their claim of error, an additional burden is imposed – that of proving the error to which no objection was made was prejudicial. *Id.* at 1778, 1781. For " '[n]o procedural principle is more familiar to this Court than that a constitutional right,' or a right of any sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' " *Id.*

at 1776 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)).

O'Neal and Respondent agree the sole issue here is who bears the burden of proof under "the *Kotteakos* standard . . . grounded in the federal harmless-error rule (28 U.S.C. § 2111)." *Brecht*, 113 S. Ct. at 1772. That is, who bears the burden of proving that the constitutional errors at O'Neal's trial did not affect his substantial rights? The simple answer to that question is the one given in *Olano* – "the subtle but important . . . language" of section 2111 and like provisions, which "precludes error-correction only if the error 'does *not* affect substantial rights,' " gives "the Government . . . [the] burden of showing the absence of prejudice . . . . " *Id.* at 1778, 1781.

Respondent attempts several arguments to deflect attention from the clear and decisive language of section 2111, the provision it nonetheless concedes (albeit under compulsion of the Court's decision in *Brecht*) is determinative here. First, Respondent argues that, as a civil or collateral remedy, the habeas corpus review structure should work differently from the direct review structure noted above.[1] Respondent is mistaken. Just as in the

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[1] The Solicitor General also suggests that 28 U.S.C. § 2254(a) somehow affects the burden of proving harmlessness – as opposed to the burden of proving a "violation of the Constitution . . . of the United States." *Id. See* Brief for the United States as *Amicus Curiae* Supporting Respondent (hereinafter Brief for the United States) at 14-15. The Government's point appears to be that, because a habeas corpus court cannot grant relief from a violation unless the violation has contributed to an adverse consequence suffered by the petitioner (*i.e.*, custody), the burden on the harmlessness question should fall on the petitioner.

review structure discussed in *Olano*, this Court has insisted that habeas corpus petitioners who made a timely objection to an error must meet a single burden of showing constitutional error, with the respondent having the burden of showing harmlessness. *See, e.g., Greer v. Miller*, 483 U.S. 756, 761 n.3 (1987). Petitioners who forfeited their claim of error must, as the penalty for their default, meet an additional burden of showing "cause" for the forfeiture and "prejudice" from the error or, alternatively, that the error resulted in a "manifest miscarriage of justice" because it led to the conviction of one who is probably innocent. *See, e.g., Coleman v. Thompson*, 111 S. Ct. 2546, 2565 (1991); *Murray v. Carrier*, 477 U.S. 478, 489 (1986).

True, in habeas corpus, the applicable *standard* of proof already results in the granting of relief less frequently than in direct appeal cases. *Brecht*, for example, adopted the more forgiving harmless error standard of

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The Government's argument fails in its effort to distinguish habeas corpus from other types of federal review. Whether on direct review in this Court or habeas corpus review in a lower court, a state prisoner cannot secure federal relief on the basis of a federal constitutional trial error that had no impact on the judgment being attacked. Under either mode of review, the absence of any nexus between the violation and the negative consequence that the litigant is trying to remove would forbid relief. The Government's argument thus, simply begs the two questions decided in *Brecht* and presented here – by what *standard* and by what *burden* of proof should that nexus be assessed? On that question, section 2254 is silent. *Kotteakos* and section 2111 are *not* silent, however. Both are dispositive that the standard is "substantial effect" and that the State bears the burden of proving that the "errors . . . do *not* affect the substantial rights of the parties." 28 U.S.C. § 2111 (emphasis added).

Kotteakos ("substantial effect") to replace the less forgiving rule of *Chapman v. California*, 386 U.S. 18 (1967), which applies on direct review. Also, as *Olano* recognizes, the standard for avoiding forfeiture of a claim is higher in habeas corpus cases than in direct review cases. 113 S. Ct. at 1779 ("In our collateral review jurisprudence, the term 'miscarriage of justice' means that the defendant is actually innocent,' " but in direct review contexts the phrase has wider meaning extending to any error that " 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings' . . . *independently* of the defendant's innocence" (quoting *United States v. Young*, 470 U.S. 1, 15 (1985), and *United States v. Frady*, 456 U.S. 152, 163 n.14 (1986) (emphasis added)). *See also Frady*, 456 U.S. at 163-66 (to avoid result of forfeiture in collateral context, more than just "plain" error must be shown). The Court consistently has relied upon higher *standards* of proof, not on different allocations of the *burden* of meeting those standards, to distinguish habeas corpus from direct review. This point is evident for the reason already noted: All the parties agree, and as *Brecht* says, "the *Kotteakos* standard [adopted in *Brecht*] is grounded in the federal harmless-error rule (28 U.S.C. § 2111)" and in "the existing body of case law . . . applying it." *Brecht*, 113 S. Ct. at 1722. Furthermore, both the "subtle but important . . . language" of section 2111 and the decisive interpretation of identical language in *Olano* clearly "preclude[] error-correction *only* if the error 'does *not* affect substantial rights.' " *Olano*, 113 S. Ct. at 1778 (first emphasis added; second emphasis in original).

Second, Respondent and *amici* rely on the various federalism and finality-based policy reasons that the

majority in *Brecht* gave for abandoning the *Chapman standard* of proof as reasons to go considerably further and abandon the longstanding, pre-*Chapman* allocation of the *burden* of proof to the proven wrongdoer.[2] The policies on which Respondent relies cannot do the work Respondent assigns them. To begin with, those reasons just sufficed to convince a bare majority of the Court to change the *Chapman standard* of proof – with one member of that

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[2] Respondent cites a few pre-*Kotteakos* decisions allocating the burden of proving harm to the moving party. Brief for Respondent at 22-23. What Respondent fails to point out is that the pre-*Kotteakos* decisions were in conflict, with a number of decisions holding that the harmless error statute assigned the burden of proving the harmlessness of nontechnical violations to the party seeking to benefit from the error. *See, e.g. Little v. United States*, 73 F.2d 861, 865-67 (10th Cir. 1934); *Nicola v. United States*, 72 F.2d 780, 783 (3d Cir. 1934); *Gold v. United States*, 26 F.2d 185, 186 (2d Cir. 1928). The critical point, however, is that it was exactly this conflict that *Kotteakos* undertook to resolve by ruling that where the error is not "technical," ' "the burden of sustaining a verdict will . . . rest upon the one who claims under [the verdict]."' *Kotteakos*, 328 U.S. at 760-61. Nor can the five post-*Kotteakos* court of appeals cases that Respondent marshals (Brief for Respondent at 30) – only one of which was decided in the last 30 years, notwithstanding the hundreds of federal harmless error cases decided each year – stand up to the Court's own decision in *Olano*, which clearly gives the burden of proving harmlessness under the Rule 52(a)/section 2111/*Kotteakos* rule to the State. *See Lane*, 474 U.S. at 449 (equating Rule 52(a) and section 2111/*Kotteakos* standards). *See also, e.g., United States v. Flores*, 968 F.2d 1366, 1372 (1st Cir. 1992); *United States v. Patrick*, 959 F.2d 991, 1002-03 (D.C. Cir. 1992); *United States v. Jefferson*, 925 F.2d 1242, 1255 & n.15 (10th Cir.), *cert. denied*, 112 S. Ct. 238 (1991); *United States v. Rivera*, 900 F.2d 1462, 1469-70 & n.4 (10th Cir. 1990); *United States v. Studley*, 892 F.2d 518, 530 (7th Cir. 1989) (all assuming that the government bears the burden of proving harmlessness under the *Kotteakos* rule).

majority, Justice Stevens, stating that he went along only on the understanding that the burden of proving the new standard would remain with the State. *Brecht*, 113 S. Ct. at 1723-24 (Stevens, J., concurring). Thus, there is nothing in *Brecht* to suggest that the same policies can do the additional heavy lifting that further modification of prior practice would require. In addition, as O'Neal demonstrates in his initial brief, a ruling that would compound *Brecht*'s change in the *standard* of proof to include a change in the longstanding *burden* of proof, would dangerously skew the delicate balance of policies that, on the one hand, favor habeas corpus' continued existence and, on the other hand, favor its limitation to deserving cases. *See* Brief for Petitioner at 30-39. Such skewing of the balance would substantially undermine the Writ's critical capacity to redress constitutional violations and avoid conviction of the innocent. *Id.*

It is suggested that a change in the burden of proof "will only affect cases in which the habeas court is in equipoise as to whether the verdict would or would not have been affected had the claimed constitutional error not occurred . . . ," *see* Brief for the United States at 18, and, in that situation, the habeas remedy should not be available. *Id.* at 16-17. This suggestion is sophistry. The burden of proof will affect every case in which the constitutional error arguably affected the verdict, not only cases in which the effect cannot be determined. In reality, harmless error analysis presents a practical problem for the court in every case because it is inherently difficult and necessarily involves some speculation regarding the jury's decisionmaking process. *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2084 (1993) (Rehnquist, C. J., concurring); *see*

also Brief for Petitioner at 32-34. Given the difficulty of harmless error analysis, there is a greater probability that constitutional errors affecting the verdict will be remedied if the State, rather than the petitioner, is required to bear the burden of proof on harmlessness. Placing the burden of proof on the petitioner "increases the likelihood that a conviction will be preserved despite an error that actually affected the reliability of the trial." *Brecht*, 113 S.Ct. at 1730 (O'Connor, J., dissenting).

Moreover, this burden which the government has traditionally borne has not been an onerous one. Few state prisoners who challenge their convictions in federal habeas corpus proceedings obtain relief. *See* Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. Cal. L. Rev. 2507, 2524 n.107 (1993) (habeas corpus relief is granted to roughly 1 in 1,000 state prisoners convicted following a trial). *Accord Brecht*, 113 S. Ct. at 1719; *Estelle v. McGuire*, 112 S. Ct. 475, 482 (1991). Because *Brecht* demonstrably lightened the government's burden of proof regarding harmless error, there is no good reason, from either a policy or practical standpoint, why the government should not continue to bear this traditional burden.

Finally, Respondent argues that *Kotteakos* gave the moving party the burden on the harmlessness question. Respondent's reading of *Kotteakos* is mistaken. Respondent acknowledges that *Kotteakos* divided the range of errors into two mutually exclusive categories – " 'technical' " error and "errors . . . where the 'natural effect is to prejudice a litigant's substantial rights.' " Brief for Respondent at 27-28 (quoting *Kotteakos*, 328 U.S. at 760). Respondent also acknowledges *Kotteakos's* conclusion that only if the error is " 'technical' [does] the burden fall[]

upon the complaining party to show that the result of the error was to affect 'his substantial rights.' " Brief for Respondent at 28 (quoting *Kotteakos*, 328 U.S. at 760). On the other hand, if the error is *not* technical, then "the burden of sustaining a verdict will . . . rest upon the one who claims under [the verdict]." *Kotteakos*, 328 U.S. at 760 (quoted in Brief for Respondent at 28). To acknowledge that *Kotteakos* gives the government the burden except as to "technical" errors, but still conclude that *Kotteakos* gives habeas petitioners the burden of proving harm, would require the Court to hold, as Respondent illogically argues, that violations of trial rights protected by the Constitution of the United States are merely "technical" errors. As untenable as this claim is on its face, it is even more so in historical context. For contemporaneously with *Kotteakos*, the Court defined "technical" errors to be only those that affect the "mere etiquette" and "formalities" of trials and procedure. *Bruno v. United States*, 308 U.S. 287, 293-94 (1939). Surely, the rule that a defendant should not be convicted except upon a jury's finding of proof beyond a reasonable doubt of every element of the crime charged – the trial right at stake in O'Neal's case – qualifies as something more than mere trial "etiquette" or "formalit[y]." *See, e.g., In re Winship*, 397 U.S. 358, 364 (1969); *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979).[3]

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[3] Respondent acknowledges that Ohio law forbade O'Neal's conviction for aggravated murder either as a principal or an accessory unless he, himself, intended that the victim die. Respondent also acknowledges that, contrary to this requirement, the trial court instructed the jury that it could convict if "there was present in the minds of the defendants *or*

This case presents the question whether it is the habeas petitioner, who has proved that he was constitutionally

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codefendants *or* aiders and abettors, if you so find, a specific intention to kill the decedent." (J.A. 170) (emphasis added). Respondent further acknowledges that, over defense objection, the trial court permitted the prosecutor to misinform the jury that O'Neal could be convicted of crimes, including aggravated murder, solely based on a finding that he "participated in a criminal conduct and engaged in a course of criminal conduct which *eventually led* to the commission of those crimes." (J.A. 58) (emphasis added). *See* Brief for Respondent at 5-6 & n.1. It is not disputed that Dimple Podborny paid Gail Toney to kill the victim, and that Gail Toney possessed the victim's property after he disappeared. (J.A. 104-109.) As Respondent's summary of the evidence (Brief for Respondent at 2-3) reveals, moreover, there was no credible direct evidence at trial that O'Neal killed or intended to kill the victim and only sketchy circumstantial evidence that he did. (J.A. 160-61.) Witnesses also testified to O'Neal's actions that aided in Toney's ongoing scheme to defraud and steal from the victim and to commit other unlawful acts short of intentional killing. The simple fact, therefore, is that both the instruction and the prosecutor's argument invited the jury, which had before it only weak evidence of O'Neal's *own* intent to kill, to convict O'Neal by way of an unconstitutional short cut – *i.e.*, by jettisoning the actual-intent-to-kill element of the offense as defined by state law and by finding, as was *conceded*, that there was an intent to kill in the minds of some *other* "aider and abettor" in the "unlawful" conspiracy to which the state linked O'Neal. The trial court's and prosecutor's constitutional violations accordingly are clear. Any ambiguity in the Court of Appeals' finding of those violations (*see* Brief for Respondent at 45; Brief for the United States at 21) thus, can only supply a further reason for remanding the case for a proper harmless error determination. For, as this Court frequently has noted, an error's harmlessness or lack thereof cannot be properly assessed without a careful specification of the error, its extent, and its likely effect on the jurors – an assessment that would not have occurred below if, as

wronged, or the respondent, the wrongdoing party, that bears the burden of showing that the latter's "errors . . . do *not* affect the substantial rights of the [petitioner]." 28 U.S.C. § 2111 (emphasis added). Because the statute, as interpreted in *Kotteakos*, places this burden on the government, the Court of Appeals' allocation to O'Neal of the burden of proof on harmlessness was improper.

Respondent and the Solicitor General claim, the Court of Appeals failed fully to specify the error. *See, e.g., Kotteakos*, 328 U.S. at 764. *See also Brecht*, 113 S. Ct. at 1724 (Stevens, J., concurring).

CONCLUSION

For the foregoing reasons, Petitioner Robert O'Neal requests the judgment of the United States Court of Appeals for the Sixth Circuit be reversed and his case be remanded to that court to determine whether Respondent can demonstrate that the constitutional errors were harmless.

Respectfully submitted,

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APPENDIX

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 8. Joinder of Offenses and of Defendants

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

FEDERAL RULES OF EVIDENCE

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Supreme Court, U.S.
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No. 93-7407

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT O'NEAL, PETITIONER

v.

FRED MCANINCH, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the State has the burden of proving a constitutional error to be harmless under *Brecht* v. *Abrahamson*, 113 S. Ct. 1710 (1993).

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5 Stuart Speiser, Charles Krause & Alfred Gans, *The American Law of Torts* (1988) 13

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v.

FRED MCANINCH, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether the State or the habeas petitioner bears the burden of proof on the issue of harmless error in a habeas corpus case, once the habeas petitioner has established that a constitutional violation has been committed. The United States has a substantial interest in the resolution of that question. Although this case arises from a habeas petition filed by a state prisoner pursuant to 28 U.S.C. 2254, many of the standards governing such petitions are similar to those governing collateral attacks by federal prisoners pursuant to 28 U.S.C. 2255. See, *e.g.*, *United States* v. *Frady*, 456 U.S. 152, 166, 169 & n.17 (1982). Because of its interest in

the circumstances under which federal prisoners may collaterally attack their convictions, the United States participated as amicus curiae in *Brecht* v. *Abrahamson*, 113 S. Ct. 1710 (1993). This Court's decision in *Brecht* provides the predicate for the question presented in this case.

STATUTE INVOLVED

28 U.S.Ct 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT

1. Petitioner was convicted after a jury trial in 1981 of aggravated murder, aggravated robbery, and kidnapping. The charges arose out of a scheme to kidnap and murder Henry Podborny, to steal Podborny's money and valuables, and to plunder his house and place of business.

Henry Podborny and his wife, "Dimple" Podborny, separated in 1980. Dimple became frightened that Henry would attempt to hurt her. She got in touch with her daughter-in-law by a prior marriage, Gail Toney, to see if Toney could help her obtain protection. Toney developed a scheme to frighten Dimple Podborny further, and then to extort money from Dimple for allegedly supplying protection. Ultimately, Dimple requested that Toney arrange to kill her estranged husband. J.A. 103-104.

As a result of the scheme, Dimple Podborny arranged for Henry Podborny to fly from his home in Chicago to

Cleveland so that he might meet with her to attempt to reconcile their marital differences. On January 29, 1981, Henry Podborny flew to Cleveland. Toney met him at the airport and dropped him off at petitioner's saloon, where he was told his wife would be waiting for him. He entered the saloon, but was never again seen alive by anyone other than petitioner and his co-defendants. J.A. 107-109.

On January 30, 1981, Toney, Dimple Podborny, and other co-conspirators drove to Chicago. They entered Henry Podborny's home and stole valuable items. They also went to Henry Podborny's place of business and opened the safe, but they did not find any money there. They then returned to Cleveland. During February and March, 1981, Toney and others attempted to obtain money from Henry Podborny's bank account. They also attempted to conceal his disappearance by writing letters that purported to be from Henry Podborny and through other schemes. Henry Podborny's partially decomposed body was found on April 24, 1981, in a field in Cleveland. J.A. 109-111.

2. Petitioner and five others were tried before a jury in state court. Petitioner was convicted of aggravated murder, aggravated robbery, and kidnapping. Substantial evidence was introduced against petitioner.

First, Toney testified at trial against petitioner. She stated that petitioner had been involved in the early stages of the plan to extort money from Dimple Podborny, and had made two trips to Chicago for that purpose. J.A. 105, 107. She also testified that she helped develop a plan under which petitioner would kidnap Henry Podborny and hold him in petitioner's saloon, while a group of co-conspirators would rob his house and place of business in Chicago. J.A. 107-108. She testified that a few minutes after she dropped Henry Podborny off at petitioner's saloon, petitioner came out of the saloon and entered her car, where

he gave her the victim's wallet, traveler's checks, credit card, and keys. J.A. 109. Toney testified that, during February and early March, 1981, petitioner told her that the victim was alive and that petitioner wanted money in return for holding the victim. J.A. 110.

Second, physical evidence showed that blood removed from various places in petitioner's saloon matched the blood found on the victim's shirt, and other physical evidence linked the murder to petitioner's saloon. Indeed, petitioner's counsel in closing argument conceded that the murder had taken place there. J.A. 157.

Third, a police officer testified that both petitioner and co-conspirator Lloyd Allen told him that they had been present when the victim had come to petitioner's saloon, and that petitioner had then gone outside and given the victim's money and valuables to Toney in her car. J.A. 156.

Fourth, Wilbur Higgins, an acquaintance of petitioner's, testified that, during the winter of 1981, he had seen petitioner and a co-conspirator parked near Higgins' house, but that petitioner had asked Higgins to leave because petitioner claimed he and the co-conspirator had women in the car with them. Higgins also testified that petitioner asked him to visit petitioner in jail on April 2, 1981; that petitioner confessed to Higgins that he had killed a man and put his body in a field near Higgins' house; and that petitioner asked Higgins to cover the body so that it would not be found. The body of Henry Podborny was in fact found in a field near Higgins' house. J.A. 159.

Petitioner's theory at trial was that Toney had access to petitioner's saloon, and that she and others had kidnapped and murdered the victim. J.A. 160. He denied having been involved in the murder, he denied having made inculpatory statements to the police, and he denied having told

Higgins that he had committed the murder. J.A. 160-161. Higgins himself admitted that he had not told the police of petitioner's admissions until he was arrested and held in jail for five hours, and he admitted telling defense counsel that he signed a statement for the police because they threatened that he would be charged with murder if he did not. J.A. 161. Finally, co-conspirator Allen testified that he was beaten to coerce him to sign a statement inculpating petitioner and himself. J.A. 160.

Petitioner's convictions were affirmed by the Ohio Court of Appeals. J.A. 83-98. The Ohio Supreme Court denied leave to appeal. See J.A. 1.

3. On September 24, 1986, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio. The case was referred to a magistrate, who rejected a number of the grounds petitioner proffered for habeas relief. See J.A. 111-115 (rejecting petitioner's claim that he had been entitled to a trial severance); J.A. 115-121 (rejecting petitioner's Confrontation and Compulsory Process Clause claims); J.A. 162-167 (rejecting petitioner's claim that the Ohio appellate court had failed to address one of his claims).

The magistrate found, however, that the jury instructions had the effect of relieving the State of its burden of proof on the element of intent, in violation of the Due Process Clause. The magistrate explained that, under Ohio law, a co-conspirator or aider and abettor is liable for an aggravated felony, if he knew that the felony and the manner of its accomplishment would be reasonably likely to produce death. J.A. 126-127. In this case, the magistrate found that the trial court had properly charged the jury on that theory when it instructed:

> [W]here you have an unlawful act contemplated in the original conspiracy, although not identical with or

> similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was performed was reasonable [sic] or likely to produce the death of another, then each conspirator, or aider and abettor is equally guilty as the principal offender of the homicide.

J.A. 127. But the magistrate found that elsewhere the instructions referred to the intent of "the defendants and/or co-conspirators, or aiders and abettors," and thereby (according to the magistrate) let the jury believe that it need only find the necessary intent for one principal in order to find that all accomplices and co-conspirators were guilty. See, *e.g.*, J.A. 67, 70, 73, 183.

The magistrate found that the prosecutor had compounded the error in his closing argument by stating:

> The State is bound to prove to a jury two things. First, that the crimes alleged have been committed. * * * The next thing we're bound to prove to you is that those accused of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes.

J.A. 58. Petitioner's objection to that statement had been overruled. The magistrate found that the prosecutor's statement had the effect of emphasizing the problem in the jury instructions, so that a reasonable juror could find petitioner guilty without finding that the State had proven that he had the necessary intent, as defined by Ohio law. J.A. 130-131.

The magistrate also found that a number of other errors had been committed, the cumulative effect of which amounted to a fundamentally unfair trial, in violation of the Due Process Clause. Among those errors were the

admission in evidence of photographs of the decomposed body of Henry Podborny, the bloodstained clothes the body was wearing, some skin from the victim's hand (ostensibly to show the fingerprints and thus identify the corpse), and a crowbar found in petitioner's bar that was not shown to have anything to do with the murder. The magistrate found that all of that evidence (except the crowbar) was relevant, but that it was unduly prejudicial and cumulative under Ohio law. See J.A. 132-139. In addition, the magistrate found that the prosecutor improperly questioned petitioner about a prior homicide, see J.A. 139-148, and that the prosecutor's closing argument was unduly inflammatory, see J.A. 148-151.

Finally, the magistrate recognized that habeas relief could be granted only if the above errors were not harmless. But he concluded that, taken together, they were not. J.A. 151-162.

4. The district court initially requested a supplemental report from the magistrate concerning the relevance, if any, of the standard federal conspirator liability instruction, derived from *Pinkerton* v. *United States,* 328 U.S. 640 (1946), to the magistrate's conclusion in this case. See J.A. 191-193. The magistrate issued a supplemental report, J.A. 201-210, essentially repeating his prior findings and stating that the problem in this case was "that [petitioner] could be found guilty of the crimes of kidnapping, robbery and murder simply based on his participation in a conspiracy to obtain money from either Mrs. or Mr. Podborny that eventually led to the commission of the offenses." J.A. 206-207. Although the magistrate stated that the trial court might have dispelled the problem in its instruction on aggravated murder, it had not done so in its instructions on aggravated robbery or kidnapping. J.A. 207-208. Moreover, the magistrate continued to believe that the trial was fundamentally unfair, in violation of the

Due Process Clause, because of the various evidentiary and other errors that he believed had been committed. J.A. 209-210.

The district court accepted the magistrate's report and granted the writ, on the grounds of "defective instructions, the prosecutor's prejudicial misconduct, and the admission of certain prejudicial evidence," in violation of the Due Process Clause. J.A. 213-214.

5. The court of appeals reversed. J.A. 217-229. The court rejected the district court's determination that the prosecutor's statements during closing argument and the improper admission of evidence rendered the trial fundamentally unfair, concluding that those errors "were at most errors in the application of state law." J.A. 228. That left the allegedly improper jury instructions, coupled with the prosecutor's reference to accomplice liability in his closing argument, as the sole basis for the grant of habeas relief.

The court of appeals stated that the district court had applied the wrong standard in evaluating the jury instructions. J.A. 222. The question should not be whether a reasonable juror "could have interpreted" the instructions to shift the burden of proof (the standard the district court applied), but rather " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Ibid.*, quoting *Estelle* v. *McGuire*, 112 S. Ct. 475, 482 & n.4 (1991).

Applying the correct standard, the court held that "the [trial] court's reference to 'defendants or co-defendants or aiders and abettors' appears to be nothing more than an unartful boilerplate reiteration that the same individuals could be found guilty *either* as principals * * * or as 'aiders and abettors.' " J.A. 224. The court also quoted the portion of the instructions in which the trial court correctly charged the jury on accomplice liability. J.A. 225-226.

The court "conclude[d] that petitioner has not demonstrated a reasonable likelihood that the jury interpreted the instructions, taken as a whole, to permit petitioner's conviction without proof that he himself had the requisite intent to kill." J.A. 226.

The court of appeals then adverted to the prosecutor's misstatement of the law during closing argument, which did appear to suggest that the petitioner's own intent was unimportant. The court stated that the district court's overruling of the objection to the prosecutor's remark "improperly suggested that the prosecution need not make an independent showing of intent as to each defendant in order for conspiracy liability to attach." J.A. 227. But, the court held, "even if this remark, in conjunction with any confusion engendered by the court's instructions on mens rea, could be said to have abridged petitioner's constitutional rights," the error was harmless, under the "substantial and injurious effect or influence in determing the jury's verdict" standard adopted by this Court in *Brecht* v. *Abrahamson*. J.A. 227-228.

The court had stated earlier in its opinion that petitioner had the burden, under *Brecht*, of showing lack of harmlessness. J.A. 221. Upon review of the evidence, the court found that "all of the evidence upon which the jury could have relied to establish petitioner's guilt pointed to his guilt as a principal." J.A. 227. Accordingly, the court concluded, even if an error had been committed, it was harmless and habeas relief should not be granted. J.A. 228.

SUMMARY OF ARGUMENT

Before a federal court may grant habeas relief on the ground that the habeas petitioner's trial was tainted by "trial-type" constitutional error, the court must determine not only whether the error occurred, but also whether it

was harmless. In *Brecht* v. *Abrahamson*, 113 S. Ct. 1710 (1993), this Court clarified that the question of harmlessness on collateral review is governed by the standard announced in *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946): whether the error "had substantial and injurious effect or influence in determining the jury's verdict." The question in this case is whether the State or the prisoner bears the burden of proof on that issue.

In our view, the burden of proof—or, what is the same in this context, the burden of persuasion—is appropriately placed on the habeas petitioner. That conclusion follows naturally from the ordinary rule that the plaintiff in a civil action bears the burden of persuasion as to every element of his claim. A habeas petitioner is a civil plaintiff, and the success of his action depends on a showing that he is "in custody in violation of the Constitution." 28 U.S.C. 2254(a). A mere showing that there has been a constitutional violation will thus ordinarily be insufficient; what must be shown is that there was a link between the petitioner's custody and the violation—*i.e.*, that the violation was not a mere harmless error. Accordingly, lack of harmlessness is appropriately seen as an element of the habeas petitioner's case, on which the habeas petitioner therefore bears the burden of persuasion.

That result also follows from fundamental principles concerning collateral attack on criminal convictions. The costs of granting habeas relief are high. It disserves the State's interest in the finality of criminal convictions. It detracts from the focus on the trial and direct review as the primary fora for resolving all relevant issues. It denigrates the ability of the trial and appellate courts to adjudicate constitutional claims, and perhaps discourages them from taking seriously their duty to do so. Since there is no time limit on filing for habeas relief, the retrial that will be necessary when such relief is granted often will pose a

substantial risk that a guilty defendant will go free due to the fading of memory or the unavailability of evidence. In light of those substantial costs, unless the habeas court can affirmatively determine that the error did have an effect on the judgment pursuant to which the prisoner is confined—*i.e.*, unless the court determines the error was not harmless—habeas relief ought not be granted.

Petitioner's rationale for requiring the State to bear the burden of persuasion on this issue is unconvincing. Requiring the habeas petitioner to bear the burden of persuasion on harmlessness is consistent with other decisions of this Court that have recognized the important distinctions between direct review and collateral attack—even where the issue, as in *Brecht* and this case, involved harmless error. Moreover, the rule we advocate comports with the customary procedures used in habeas cases and does not render the litigation of such cases unwieldy or unfair. Regardless of how the burden of persuasion is allocated, the issue of harmless error will inevitably be litigated in habeas cases; both parties will inevitably argue their views of the record to the court; and the court will ultimately be obliged to review the entire record to make a harmless error determination. The issue in this case is one of substance, not procedure: whether the court must grant habeas relief when, at the end of the litigation, it is in equipoise on the harmless error issue. There is no reason to believe that the resolution of that question will have any effect on the difficulty of adjudicating habeas claims.

ARGUMENT

A. THE HABEAS PETITIONER SHOULD BEAR THE BURDEN OF PROOF ON THE ISSUE OF HARMLESSNESS

1. It has long been established that a federal habeas court may not grant relief to a prisoner on the basis of a

"trial error," see *Arizona* v. *Fulminante,* 499 U.S. 279, 307 (1991), if it finds that the error was harmless. See, *e.g.*, *Yates* v. *Evatt,* 500 U.S. 391, 402 (1991); *Rose* v. *Clark,* 478 U.S. 570 (1986); *Rushen* v. *Spain,* 464 U.S. 114, 117-118 & n.2 (1983); *Hopper* v. *Evans,* 456 U.S. 605 (1982); *Milton* v. *Wainwright,* 407 U.S. 371 (1972); *Chambers* v. *Maroney,* 399 U.S. 42, 52-53 (1970). Thus, harmless error review is an inescapable part of adjudicating most types of constitutional claims on collateral attack of a criminal conviction.

In *Brecht* v. *Abrahamson,* 113 S. Ct. 1710, 1714 (1993), this Court explained that, in the habeas context, the standard governing the harmless error analysis is the standard employed by the Court in *Kotteakos* v. *United States,* 328 U.S. 750, 776 (1946): whether the error "had substantial and injurious effect or influence in determining the jury's verdict." The question presented in this case is whether the State or the habeas petitioner bears the burden of making that showing.

2. Initially, we note that the question presented in this case is a narrow one. The term "burden of proof" has been used to refer to two different concepts. The more common and more recent use of the term refers to the "burden of persuasion"—the "notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries,* No. 93-744 (June 20, 1994), slip op. 5. But it has also been used to refer to the "burden of production"—"a party's obligation to come forward with evidence to support its claim." *Ibid.*

The question presented in this case concerns only the burden of persuasion. Both parties in a habeas case will, in the ordinary case, attempt to convince the court that an error was (or was not) harmless by means of references to the record and legal argument. But the "evidence" on the

basis of which a habeas court will decide the harmless error issue ordinarily consists simply of the record of the original trial. Since no additional evidence ordinarily need be introduced—and since the record of the trial will already have been placed before the habeas court in the course of litigation concerning whether a constitutional error was committed—there is no occasion for allocating a burden of production of evidence concerning harmless error. Thus, the only burden to allocate with regard to harmless error is the burden of persuasion—*i.e.*, whether the State or the prisoner wins in the unusual case in which a court is in equipoise as to whether the error is harmless.

3. The ordinary rule governing the allocation of the burden of persuasion is that the plaintiff bears the burden of persuasion on every issue necessary to make out his claim. As Dean McCormick explained, that is because "the plaintiff * * * generally seeks to change the present state of affairs and * * * therefore naturally should be expected to bear the risk of failure of proof or presentation." 2 *McCormick on Evidence* § 337, at 428 (J. Strong ed., 4th ed. 1992). That rule is applied in areas from tort law, where the plaintiff bears the burden of persuading the trier of fact as to both negligence and causation, see, *e.g.*, 5 Stuart Speiser, Charles Krause & Alfred Gans, *The American Law of Torts* § 18:41, at 763, 764 (1988), to the law of employment discrimination, where a long line of this Court's precedents have established that, regardless of the fact that burdens of production may shift, the plaintiff at all times bears the ultimate burden of persuasion. See, *e.g.*, *United States Postal Serv. Bd. of Governors* v. *Aikens,* 460 U.S. 711, 716 (1983); *Texas Dep't of Community Affairs* v. *Burdine,* 450 U.S. 248, 256 (1981). Indeed, as this Court recently explained in *Greenwich Collieries,* the Administrative Procedure Act codified this principle in Section 7(c), 5 U.S.C. 556(d), which provides that "the pro-

ponent of a rule or order has the burden of proof." See *Greenwich Collieries,* slip op. 9.

A habeas corpus action is a separate proceeding in which the petitioner is in the position of a plaintiff. The allegation the habeas petitioner must make in order to obtain relief is provided by 28 U.S.C. 2254(a): federal courts are given authority by that provision to "entertain an application for a writ of habeas corpus" by a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." It is only on that basis that a federal court may grant habeas relief.

That bedrock criterion for habeas relief requires proof of two facts. First, there must have been a violation of the Constitution, which is ordinarily the only source of federal law whose violation in a state criminal proceeding could warrant exercise of a federal court's habeas jurisdiction. See *Davis* v. *United States,* 417 U.S. 333, 346 (1974) (habeas relief available only for "a fundamental defect which inherently results in a miscarriage of justice"). But cf. *Kirk* v. *Finkbeiner,* 474 U.S. 929 (1985) (White, J., dissenting from denial of certiorari). Second, the habeas petitioner must be "in custody." But those facts are linked in the statutory phrase, rather than entirely separate and independent. Nor does it satisfy the meaning of the phrase "in custody in violation of the Constitution" merely to require that the constitutional violation must have occurred in the course of the trial that led up to the conviction pursuant to which the petitioner is in custody. See, *e.g.*, *Maleng* v. *Cook,* 490 U.S. 488 (1989) (per curiam). Instead, the requirement that the prisoner be "in custody in violation of the Constitution" requires a link between the constitutional violation and the custody: the constitutional error must not merely have occurred at the prisoner's trial, but it must have resulted in the prisoner's current custody.

Where an error is harmless—*i.e.*, where it had no "substantial and injurious" effect on the verdict—it cannot be said to have resulted in the prisoner's custody. Therefore, proof of the requisite causal relationship—*i.e.*, proof of a lack of harmlessness—is most naturally regarded as a necessary part of the proof of the core statutory criterion for habeas relief—that the petitioner is in custody in violation of the Constitution. It follows that the burden of proving that fact is most naturally placed on the habeas petitioner.

4. The conclusion that the habeas petitioner bears the burden of persuasion on the issue of harmlessness is reinforced by fundamental principles concerning the nature of collateral review of criminal convictions. As this Court has repeatedly emphasized, granting habeas relief imposes a heavy cost on society. It directly frustrates the public interest in the finality of criminal convictions, which is essential to the "deterrent effect" of the criminal law, see *Teague* v. *Lane,* 489 U.S. 288, 309 (1989) (plurality opinion), and without which "[n]either innocence nor just punishment can be vindicated." *McCleskey* v. *Zant,* 499 U.S. 467, 491 (1991). "[T]he deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks." *Kuhlmann* v. *Wilson,* 477 U.S. 436, 452-453 (1986) (plurality opinion).

Granting habeas relief also "degrades the prominence of the trial itself," *Engle* v. *Isaac,* 456 U.S. 107, 127 (1982), as the primary forum for resolution of all legal and factual issues regarding the charges against the defendant. Not only does it encourage the litigants to focus their attention away from the "main event" to the collateral proceedings that may follow, *Wainwright* v. *Sykes,* 433 U.S. 72, 90 (1977), but it also denigrates the ability of the original trial

and appellate courts to enforce the federal constitution. See, *e.g.*, *Brecht*, 113 S. Ct. at 1721.

Finally, the belated retrials that result from granting habeas relief—in this case, a retrial if required would take place some 14 years after the offense and the original trial—seriously undermine the capacity of the judicial system to fulfill its primary, truth-seeking function. "[W]hen a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time * * * prejudice the government and diminish the chances of a reliable criminal adjudication." *McCleskey* v. *Zant*, 499 U.S. at 491 (internal citation and quotation marks omitted); *Engle* v. *Isaac*, 456 U.S. at 127-128; Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 147 (1970).

In light of those costs, this Court has limited the availability of collateral review and has distinguished between direct and collateral review in a variety of circumstances. See *Brecht*, 113 S. Ct. at 1720 (citing cases). It is appropriate to do so in this case as well. The question presented in this case arises only where the habeas court is in equipoise as to whether a constitutional error did or did not affect the verdict at the prisoner's trial. On direct review, it is reasonable to conclude that in that situation of equipoise a new trial should be ordered—at least where the defendant properly raised and preserved the claim of error. See *United States* v. *Olano*, 113 S. Ct. 1770, 1778 (1993). But on habeas, a prisoner who has already had the benefit of direct review is now bringing an independent action seeking to overturn his conviction. At that stage, if the court is in equipoise on the issue of harmlessness, it is reasonable to conclude that the "extraordinary remedy" afforded by habeas corpus is not available. See *Brecht*, 113 S. Ct. at 1719. Unless the habeas court can affirmatively determine

that the error *did* have an effect on the judgment pursuant to which the prisoner is committed, it does not violate "fundamental fairness," *ibid.*, quoting *Engle* v. *Isaac*, 456 U.S. 107, 126 (1982), to conclude that the prisoner has failed to establish his entitlement to relief.

B. REQUIRING THE HABEAS PETITIONER TO BEAR THE BURDEN OF PROOF AS TO HARMLESSNESS FOLLOWS FROM THIS COURT'S RECENT CASES AND COMPORTS WITH CUSTOMARY PROCEDURES IN LITIGATING HABEAS CORPUS CASES

1. Petitioner contends that "the central focus of this Court's modern habeas jurisprudence is the writ's assurance that constitutional errors do not cause the conviction of an actually innocent person," Pet. Br. 30, and that placing the burden of persuasion as to harmlessness on the habeas petitioner would contravene that principle.

Petitioner's premise is mistaken. The touchstone of the Court's recent habeas jurisprudence is recognition that "the writ of habeas corpus has historically been regarded as an extraordinary remedy, a bulwark against convictions that violate fundamental fairness" as a result of a constitutional error. *Brecht*, 113 S. Ct. at 1719 (internal quotation marks omitted); see also *Herrera* v. *Collins*, 113 S. Ct. 853 (1993). Where it is fundamentally unfair to continue to hold a prisoner in confinement—such as "where a constitutional violation has probably resulted in the conviction of one who is actually innocent," *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986)—the Court has indicated a willingness to relax otherwise applicable rules that may limit the claims available to a habeas petitioner. See, *e.g.*, *Sawyer* v. *Whitley*, 112 S. Ct. 2514, 2518 (1992); *Teague* v. *Lane*, 489 U.S. at 311-313; *Kuhlmann* v. *Wilson*, 477 U.S. 436, 455 & n.17 (1986). But this case concerns how a habeas petition is to be treated in precisely those cases in which

it *cannot* be said that the habeas petitioner has shown that the constitutional error "probably resulted in the conviction of one who is actually innocent." For the Court's allocation of the burden of persuasion will *only* affect cases in which the habeas court is in equipoise as to whether the verdict would or would not have been affected had the claimed constitutional error not occurred. By definition, none of those cases will be ones in which the habeas petitioner has made a showing that, though he was innocent, a constitutional error probably resulted in his conviction.

Moreover, in light of the variety of interests that are protected by constitutional rules, there will undoubtedly be cases in which the harmless error inquiry and the question of actual innocence will not be at all parallel. Thus, there may well be cases in which a constitutional error occurred and was found not to be harmless, but in which the error casts little doubt on the habeas petitioner's guilt of the underlying crime. See, *e.g.*, *Kimmelman* v. *Morrison*, 477 U.S. 365, 379-380 (1986); *Rose* v. *Mitchell*, 443 U.S. 545 (1979). In short, allotting to the habeas petitioner the burden of persuasion on the issue of harmless error is reinforced by this Court's recent cases recognizing the limits of habeas review, and it is not at all inconsistent with the Court's recognition of the "actual innocence" exception to those limits. Indeed, the decision in *Brecht* to apply a less rigorous form of harmless error analysis on habeas itself establishes that conclusion.

2. Petitioner also argues that allocating the burden of proof as to harmlessness to pro se habeas petitioners would needlessly complicate the process of resolving their claims. In this regard, petitioner argues that courts will be required to "seek out a lay petitioner's facts and arguments on the harmless error issue," and to create "an incentive, or even * * * a legal requirement on the part of petitioners

to demonstrate harm as to every claim in every petition." Pet. Br. 37.

Petitioner's fears are unfounded. The "evidence" as to harmlessness, which will ordinarily consist of the record of the original trial, will be entirely before the court, regardless of how the burden of persuasion as to harmlessness is allocated. Because neither party thus has to introduce any evidence as to the harmless error issue, arguments about which party has superior access to the evidence or superior ability to bring it before the court are entirely beside the point. Regardless of how this case is decided, in cases in which the harmless error issue is potentially dispositive, both parties will have every incentive to argue before the court for their interpretations of the record and the court, having heard the argument, will have to review the entire record and make the ultimate judgment as to harmlessness.

Nor is the order of proof in habeas cases likely to be affected by the Court's decision in this case. At present, habeas courts are free to decide the harmless error issue prior to deciding the merits if proceeding in that way appears to be most convenient. Nothing in the allocation of the burden of persuasion as to harmless error is likely to change that. Nor is there any reason to believe that the technical rules of pleading or practice in habeas cases would be altered by the Court's decision in this case.

3. Finally, petitioner argues (Pet. Br. 39-42) that allocating the burden of persuasion as to harmlessness to habeas petitioners would in effect impose the same burden of "prejudice" on all habeas petitioners as current law imposes on habeas petitioners who have procedurally defaulted on their claims or who have abused the writ. See *Wainwright* v. *Sykes*, 433 U.S. at 87-89; *McCleskey* v. *Zant*, 499 U.S. at 468.

Petitioner is mistaken on this point as well. The "prejudice" standard that must be satisfied under *Sykes* or *McCleskey* is substantially more rigorous than the harmless error standard at issue in this case. To show prejudice that would sustain a habeas petition containing defaulted or abusive claims, the petitioner must show "not merely that the errors at * * * trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Murray* v. *Carrier,* 477 U.S. at 494 (internal quotation marks omitted). By contrast, under the *Kotteakos* harmless error standard adopted by this Court in *Brecht,* an error is not harmless if it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht,* 113 S. Ct. at 1722.

An example will illustrate the difference between the two standards. A habeas petitioner may, depending on the facts, be able to satisfy the *Kotteakos* harmless error standard by showing that a non-*Mirandized,* though voluntary and intelligent, confession was admitted at his trial; if so, the petitioner may obtain habeas relief if his claim was properly raised and preserved. See *Withrow* v. *Williams,* 113 S. Ct. 1745 (1993). But a habeas petitioner who had defaulted on such a claim probably could not obtain relief under the "prejudice" prong of the *Wainwright* v. *Sykes* standard, for it may not be "fundamentally unfair" for his conviction to rest in part on the basis of a voluntary and intelligent confession.

In any event, even if the harmless error inquiry and the "prejudice" prong of the *Sykes/McCleskey* cause and prejudice standard were more similar than they are, imposing the burden of proving harmless error on all habeas petitioners who allege trial error would have little impact on the incentives for either party to raise claims at the earliest opportunity. A prisoner of course could always benefit by

bringing his claim at the first opportunity, because he would thereby be relieved of the burden of proving "cause" for his default or abuse and because he would be likely to want to avoid unnecessary time in confinement.

4. The court of appeals' decision should be affirmed. The court stated that "[t]he habeas petitioner bears the burden of establishing" harmless error. J.A. 221. The only error that the court of appeals identified—and, as we read the court of appeals' opinion, it merely accepted *arguendo* that the error had been committed—was the possibility that the prosecutor's closing argument, coupled with some confusion in the court's instructions, may have left the jury misinformed about the proper standard for accomplice liability under Ohio law. See J.A. 227. But the court found that the alleged error was in any event harmless because "all of the evidence upon which the jury could have relied to establish petitioner's guilt pointed to his guilt as a principal." *Ibid.*

In light of the court of appeals' conclusions, even if this Court were to decide that the State must bear the burden of persuasion as to harmlessness, there would be a substantial argument that the State had satisfied that burden. But that question need not be reached in this case. Since the court of appeals applied the appropriate standard for proving harmlessness and correctly placed the burden of persuasion on the issue on petitioner, the court of appeals' decision should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT O'NEAL,

Petitioner,

—v.—

FRED McANINCH, Warden,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF OHIO IN SUPPORT OF PETITIONER

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ISSUE PRESENTED

Once the petitioner in a federal habeas corpus action has carried the burden of establishing federal constitutional error at trial in state court, must the petitioner carry the additional burden of proving that the error was not harmless?

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Ohio is one of its affiliates.

The ACLU has long worked to protect the rights of criminal defendants and their access to the federal courts and has participated in numerous cases before this Court, as counsel for litigants or as *amicus curiae*, including *Brecht v. Abrahamson*, 507 U.S. __, 113 S.Ct. 1710 (1993), which redefined the harmless error standard in habeas corpus cases.

The party briefs elaborate on the particular circumstances of this case. This brief, by contrast, focuses on the doctrinal implications of requiring habeas petitioners, for the first time, to shoulder the burden of proof with respect to the alleged harmlessness of constitutional error.

STATEMENT OF THE CASE

In 1981, the petitioner, Robert O'Neal, was convicted of murder, robbery, and kidnapping in an Ohio state court. He was sentenced to a life term in prison and two terms of years. After exhausting state remedies, he sought federal habeas corpus relief on the ground, *inter alia*, that the instructions given to the jury at trial unconstitutionally relieved the prosecution of its burden to demonstrate his guilt beyond a reasonable doubt. *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The district court concluded that Mr. O'Neal was en-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

titled to relief, but a panel of the United States Court of Appeals for the Sixth Circuit reversed. *O'Neal v. Morris*, 3 F.2d 143 (6th Cir. 1993). In so doing, the circuit court held that the prisoner in a federal habeas corpus action bears the burden of defeating the respondent's argument that constitutionally invalid jury instructions were harmless. This Court granted *certiorari* to decide whether that allocation of the burden of proof was mistaken.

SUMMARY OF ARGUMENT

Prior to *Chapman v. California*, 386 U.S. 18 (1967), most courts understood that constitutional error in a criminal case could never be "harmless" and always warranted relief, either on direct review or in federal habeas corpus. That understanding changed after *Chapman*, where the Court held that some constitutional errors at trial could be ignored if it could be said with relative assurance that they had no effect on the ultimate verdict.

In rationalizing this fundamental change in constitutional jurisprudence, *Chapman* weighed the costs of automatic reversal against the risks of erroneous convictions and concluded that the system could tolerate some additional risk. To ensure that the idea of harmless error remained within close bounds, however, the Court held that no error could be considered harmless unless the prosecution demonstrated, beyond a reasonable doubt, that the error had not influenced the verdict.

The careful balance articulated in *Chapman* remained the governing rule for more than two decades until last Term's decision in *Brecht v. Abrahamson*, 113 S.Ct. 1710, which relaxed the *standard* for determining harmless error in habeas corpus cases pursuant to 28 U.S.C. §2254. Under *Brecht*, constitutional trial error can be held harmless if it had no "substantial" effect on the verdict within the meaning of the benchmark harmless error case, *Kotteakos v. United States*, 328 U.S. 750

(1946). This standard, of course, created a greater risk of erroneous conviction than the previously applicable *Chapman* rule.

Now, the risk of erroneous conviction has been increased still further by the decision of the Sixth Circuit in this case to shift the burden of proof with respect to harmless error to the prisoner. The circuit decision misapprehends the very nature of the decision the Court made in *Brecht* and, in so doing, scrambles the doctrine worked out by the combination of *Brecht*, *Chapman*, and *Kotteakos* in a way that threatens the bedrock objectives of the criminal justice system: accurate determinations of guilt or innocence.

Shifting the burden of proof with respect to harmless error is out of step with this Court's habeas decisions generally. Those decisions have justified various procedural barriers to the federal forum as efforts to conserve scarce federal judicial resources and to respect legitimate state interests. The burden allocation the circuit court has adopted does not streamline or expedite the processing of claims in habeas corpus, but impedes the federal courts' ability to adjudicate properly preserved claims on the merits.

In *Brecht*, this Court altered the standard by which federal habeas corpus courts judge harmless error, but did not disturb the traditional understanding that the burden of demonstrating that error was harmless lies with the party who stands to benefit from an affirmative determination: the respondent.

As justification for this decision, the circuit court erroneously relied on a single sentence in this Court's opinion in *Brecht*. On close examination, that sentence will not bear the weight the circuit attaches to it. Indeed, read as a whole, the *Brecht* opinion makes clear that the Court in that case did not alter the settled norm regarding burdens of proof.

The preservation of the burden on the respondent harmonizes the framework for harmless error analysis in habeas corpus cases under 28 U.S.C. §2254 with practice under the federal harmless error statute, 28 U.S.C. §2111; the relevant rule, Fed.R.Crim.P. 52(a); and, indeed, the very decision to which *Brecht* looked for primary guidance: *Kotteakos*. It also reconciles *Brecht* with this Court's cases on the effects of procedural default.

The conventional allocation of the burden of proof to the state is supported by solid, practical analysis. It advances the accuracy of criminal judgments, comports with ordinary expectations regarding the allocation of burdens in constitutional litigation, and assigns responsibility to the party with the incentive and capacity to develop the relevant evidence and arguments.

A reallocation of the burden of proof with respect to harmless error would complicate and confuse the determination of the merits of claims in habeas corpus, distorting the habeas courts' understanding and exposition of federal constitutional rights. Those distortions would not be offset by any practical benefits. Both the federal courts and state authorities would find their work more, not less, burdensome.

ARGUMENT

I. THE DECISION IN *BRECHT* DID NOT DISTURB THE SETTLED PRINCIPLE THAT THE RESPONDENT BEARS THE BURDEN OF PROVING HARMLESS CONSTITUTIONAL ERROR IN HABEAS CORPUS CASES PURSUANT TO 28 U.S.C. §2254

A. The Holding In *Brecht*

The *Chapman* framework for deciding whether error was harmless has two elements. First, *Chapman* establishes a *standard* of decision. Constitutional error can be

said to have been harmless only if the reviewing court concludes "beyond a reasonable doubt" that the error did not contribute to the verdict. 386 U.S. at 24, 26. Second, *Chapman* allocates the *burden* of proving that error was harmless under the "reasonable doubt" standard. Under *Chapman*, that burden clearly rests with the state. *Id.* at 24.

The question on which *certiorari* was granted in *Brecht* isolated the standard for judging harmless error from the allocation of the burden of proof under that standard.[2] At the outset of its opinion, the Court similarly defined the question before the Court as whether the *Chapman* "*standard*" applies in habeas corpus as well as on direct review. 113 S.Ct. at 1713-14 (emphasis added).[3]

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[2] The first question presented by the parties in *Brecht*, and the only question on which this Court granted *certiorari*, was:

> When considering violations of *Doyle v. Ohio* . . . in federal habeas corpus proceedings, is it consistent with constitutional due process and the Sixth Amendment right to trial by jury to abandon [a] *standard* of review of whether constitutional error was harmless beyond a reasonable doubt and substitute [a] *standard* of whether the error substantially affected the course of trial?

See Brecht v. Abrahamson, 112 S.Ct. 2938 (emphasis added).

[3] Specifically, the Chief Justice said:

> In [*Chapman*], we held that the *standard* for determining whether a conviction must be set aside because of federal constitutional error is whether the error 'was harmless beyond a reasonable doubt.' In this case we must decide whether the *Chapman* harmless error *standard* applies in determining whether the prosecution's use for impeachment purposes of petitioner's post-*Miranda* silence, in violation of due process under [*Doyle v. Ohio*], entitles petitioner to habeas corpus relief.

Id. (citations omitted)(emphasis added).

Having undertaken to decide only whether the *Chapman* "standard" applies in §2254 cases, the Court confined its judgment in *Brecht* accordingly. Referring to the *Chapman* standard, the Court held: "[I]t does not [apply]." 113 S.Ct. at 1714. Instead, after *Brecht*, the "less onerous" harmless error "standard" borrowed from *Kotteakos* controls. *Id.* Thus, the harmless error inquiry in §2254 cases is now whether conceded constitutional error at trial had a "substantial and injurious effect or influence" on the verdict. *Id.*, quoting *Kotteakos* at 776.[4]

There is no mistaking that both the Court's statement of the issue in *Brecht* and its statement of the judgment were narrowly couched to avoid lumping the two elements of *Chapman* together. When the Court mentioned the burden issue, it cleanly distinguished it and, moreover, expressly acknowledged that *Chapman* places the burden on the state. *Brecht*, 113 S.Ct. at 1717.

The Court wrestled at length in *Brecht* with the question whether the *Chapman* "reasonable doubt"

[4] The Court noted in *Brecht* that this means that the reviewing court must find "prejudice" of some order. *Brecht*, 113 S.Ct. at 1722, citing *United States v. Lane*, 474 U.S. 438, 449 (1986)(citing, in turn, Rule 52(a) -- which places the burden on the government). In this context, "prejudice" is very much a term of art. To say that "prejudice" is an issue is merely to signal that the error found to have occurred in a case is subject to harmless error analysis and that, accordingly, the reviewing court must explore the trial record to determine what its influence may have been. To say that "prejudice" is not an issue is to say that the error identified in a case is not susceptible to harmless error analysis -- because it is "structural" or otherwise linked to the core integrity of the process and thus mandates relief without an examination of the record. *See Brecht*, 113 S.Ct. 1717. It is possible, but potentially confusing, to say that errors in this second category are presumptively prejudicial. The point, however, is that no investigation or conclusion regarding their effect on the verdict is pertinent. On the usage of the term "prejudice," *see United States v. Olano*, 507 U.S. __, 113 S.Ct. 1770, 1778 (1993); James S. Liebman & Randy Hertz, "*Brecht v. Abrahamson*: Harmful Error in Habeas Corpus Law," 84 J.Crim.L. & Criminology 1401, 1413-14 n.47 (1994).

standard should be discarded in §2254 cases. By contrast, the Court offered no express treatment of the burden-of-proof question at all. Accordingly, *Brecht* must be understood to leave the burden of proof respecting harmless error where it has always rested: with the respondent. If the Court means in this case to revisit this long-settled principle of federal law, the starting place is not *Brecht*, but *Chapman* -- and all the other precedents endorsing *Chapman*.[5]

B. The *Dictum* In *Brecht*

The circuit court below mistakenly read a sentence in *Brecht* to assign the burden with respect to harmless error to the prisoner. Simply put, that sentence does not support the proposition for which the circuit cites it. In its entirety, it merely notes that petitioners are no longer entitled to habeas relief unless "they can establish" constitutional error that had a substantial effect on the verdict. *Brecht*, 113 S.Ct. at 1722. That, in turn, merely restates the Court's holding-in-chief: habeas corpus relief is not available unless the prisoner demonstrates constitutional error that survives harmless error analysis under the *Kotteakos* standard. There are several reasons for reading the sentence in this way and thus for declining to read it the way the circuit court has.

First, at the very most the sentence was *dictum*. When the Court turned to the harmless error question in *Brecht*, it simply examined the record and concluded that the error in that case had not had the necessary "substantial influence" on the verdict. The Court did not find the issue close and therefore had no reason to invoke the allocation of the burden of proof as a tie-

[5] *E.g.*, *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)(reversing a state court judgment because the state court had rebuffed the state's attempt to demonstrate that error had been harmless).

breaker. Indeed, the Court never referred to the burden question again. Nothing actually decided in *Brecht* depended on any allocation of the burden of proof.[6]

Second, the Court in *Brecht* did not squarely address the burden question, grapple with the issue, or *decide* it. The Court discussed its reasons for abandoning the *Chapman* standard for determining harmless error, but said nothing at all about an additional decision to shift the burden of proof. Since such a decision would have constituted a dramatic departure from precedent, as well as the very *Kotteakos* framework the Court incorporated in *Brecht*, it is dubious business to read an isolated line in its opinion to mean any such thing.[7] One "solitary sentence" embracing an unexamined proposition of law does not constitute an authoritative judgment. *Harper v. Virginia Dep't of Taxation*, 509 U.S. __, 113 S.Ct. 2510, 2510 (1993)(O'Connor, J., dissenting).

Third, the holding and the opinion in *Brecht* had majority support only inasmuch as Justice Stevens joined both. Justice Stevens, for his part, made it clear in his critical concurring opinion that he understood the Court

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[6] Indeed, the Court repeatedly articulated its precise holding entirely by reference to the shift in the standard from *Chapman* to *Kotteakos* and *never* by reference to any reallocation of the burden of proof. *E.g.*, *Brecht*, 113 S.Ct. at 1722:

> The *Kotteakos* standard, we believe, fills the bill. The test under *Kotteakos* is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict' . . . . For the foregoing reasons . . . we hold that the *Kotteakos* harmless error standard applies . . . .

[7] Decisions that at best assume the applicability of legal rules, but do not "squarely address" them, are not entitled to *stare decisis* respect. *Brecht* itself is authority for this conventional understanding. *Brecht*, 113 S.Ct. at 1717-18 (discounting the precedential value of previous decisions invoking the *Chapman* "reasonable doubt" standard in habeas corpus).

to embrace the whole of the *Kotteakos* approach to harmless error -- both the "substantial" effect standard and the allocation of the burden to the prosecution. *Brecht*, 113 S.Ct. at 1723 (concurring opinion). In light of Justice Stevens' exacting language with respect to the burden issue and his participation in the Court's opinion as well as its judgment, it must follow that the sentence on which the circuit relies simply does not stand for the proposition the circuit ascribes to it.[8]

II. THE ALLOCATION OF THE BURDEN TO THE RESPONDENT IN §2254 CASES IS CONSISTENT WITH SIMILAR BURDEN ALLOCATIONS IN ALLIED CONTEXTS

When similar questions arise in adjacent fields of federal practice, this Court tries to achieve as much intellectual coherence as possible across doctrinal categories. Otherwise, different rules may develop for handling essentially the same problem in different contexts -- with no explanation for the inconsistency save that each body of law has developed in isolation. That kind of blindered jurisprudence produces only confusion, inefficiency, and injustice. The maintenance of the traditional burden allocation in this context reconciles harmless error doctrine in habeas corpus with other bodies of similar doctrine in related contexts and thus fosters clear, consistent analysis.

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[8] Justice White apparently read the Court to place the burden on the "defendant." *Brecht*, 113 S.Ct. at 1727 (dissenting opinion). Yet that characterization may, perhaps, be put down to a dissenter's inclination to cast the majority's work in the most negative light. Certainly the Court is not bound in this case to bow to a dissenter's account of a previous decision. *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. __, 112 S. Ct. 2395, 2406 (1992)(Rehnquist, C.J., dissenting) (pointing out that "a mistaken allusion in a later case to the facts of an earlier case does not by itself undermine the holding of the earlier case").

A. 28 U.S.C. §2111

In *Brecht*, this Court did not cut harmless error in §2254 cases loose from *Chapman* and all other sources of guidance and set it free to develop its own independent body of new law. Quite the contrary, the Court explicitly embraced the standard for judging harmless error elaborated in *Kotteakos* and now codified in 28 U.S.C. §2111.[9] That choice was scarcely accidental. The Court explained that one of its chief reasons for introducing *Kotteakos* into habeas was to have the benefit of a ready-made body of existing case law to which the district courts can look for guidance. *Brecht*, 113 S.Ct. at 1722.

Clearly, then, *Brecht* was at pains to avoid inconsistency between cases arising under §2254 and those arising under §2111. Having incorporated the *Kotteakos* standard for judging harmless error on appeal, it is logical and reasonable for the Court also to embrace the burden allocation in that case. As Justice Stevens pointed out in *Brecht*, *Kotteakos* and its progeny place the burden of proving that constitutional error was harmless where it has traditionally rested -- with the prosecution. *Brecht*, 113 S.Ct. at 1723 (concurring opinion).

There is no question that Justice Stevens accurately portrays the longstanding and current rule that the government bears the burden in §2111 cases. *See Kotteakos*, 328 U.S. at 760-65 (explaining that the individual bears the burden only if he or she insists that a conviction

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[9] 28 U.S.C. §2111 is the so-called federal harmless error statute. It provides:

> On the hearing of any appeal or writ of *certiorari* in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

should be reversed on the basis of "technical" errors).[10] The decisive point is that in *Kotteakos*, and uniformly in cases decided under §2111, ties go to the individual. If after examining all the evidence and hearing all the contending arguments, the court remains in doubt regarding the effect an error had on the verdict, then the error cannot be found harmless and the conviction cannot stand.[11] This result, of course, follows as a logical imperative from the assignment of the burden of proof to the government.[12]

B. Federal Rule Of Criminal Procedure 52

The allocation of the burden to the respondent in §2254 cases and to the prosecution in appellate cases controlled by §2111 tracks, in turn, the same allocation under Rule 52(a) of the Federal Rules of Criminal Procedure.[13] Here again, in aid of consistency the statute

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[10] Of course, the reference to "technical" errors in the controlling statute, now codified at §2111, has since been deleted. That change makes no difference. *Brecht*, 113 S.Ct. at 1718 n.7 (explaining that the amendment in 1949 left the laboring language of the statute untouched). *See United States v. Rivera*, 900 F.2d 1462, 1469-70 (10th Cir. 1990).

[11] Specifically, the Court said in *Kotteakos* that if the court "cannot say, with assurance . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected" and thus that the error was harmless. 328 U.S. at 765.

[12] *Cf.* Fleming James, Jr., Geoffrey C. Hazard, Jr. & John Leubsdorf, CIVIL PROCEDURE 338 (4th ed. 1992)(recalling Dean Wigmore's explanation of the "risk of nonpersuasion"). It is only fair and just that the prisoner whose constitutional rights have concededly been violated, and whose liberty (or whose very life) hangs in the balance, should have the benefit of the doubt when, after hearing the arguments on both sides of the harmless error question, a court finds itself in "mental equipoise."

[13] Rule 52 states:

> (a) Harmless Error. Any error, defect, irregularity or vari-

(continued...)

has been reconciled with the rule,[14] and the rule has been read to put the burden of proof on the government.

This settled understanding was reaffirmed last Term in *United States v. Olano*, 113 S.Ct. at 1778, decided only a week after *Brecht*.[15] Rule 52 has two parts: Rule 52(a) governs "harmless error," while Rule 52(b) controls "plain error." As the Court explained in *Olano*, the *standard* for deciding whether error is reversible is the same under both parts of the rule. Under either heading, criminal convictions must be overturned, unless the reviewing court concludes that the error identified did not affect the individual's substantial rights.

The difference between the two parts of the rule occurs, accordingly, with respect to the *burden* of demonstrating reversible error on that standard. Under Rule 52(a), the government bears the burden of demonstrating "harmless error;" under Rule 52(b), the individual bears the burden of showing "plain error." This difference is grounded, in turn, on the difference in the circumstances in which "harmless" or "plain" errors come to the reviewing court's attention. Rule 52(a) governs ordinary cases, in which the criminal defendant raised a timely objection below and contends that the error that occurred over that objection substantially affected the verdict. If the government hopes to avoid reversal notwithstanding such an error, then the government must prove to the court's satisfaction that the error had no such effect.

Rule 52(b), by contrast, governs extraordinary cases, in which the defendant failed to preserve an objection and then asks the reviewing court to consider the error anyway. In a case of that kind, the defendant's default in failing to enter a timely objection below typically results in a forfeiture of any opportunity to press the error on appeal. Rule 52(b) establishes a special safety valve, under which the reviewing court can overlook the defendant's default in order to correct "plain" errors. In that special situation, the government's ordinary burden is suspended, however, and the individual is called on to demonstrate that the error *did* influence the result at trial.

It is Rule 52(a), then, that corresponds to the harmless error doctrine in habeas corpus cases and in appellate cases reviewed under §2111, because it is Rule 52(a) that governs errors that *were* raised in a timely and proper manner and therefore must bring reversal unless the government carries its well-settled burden of demonstrating that the verdict was unaffected. Under Rule 52(a), as under §2111, when the reviewing court retains doubt regarding whether error *did* substantially affect the verdict, that doubt must be resolved against the government -- which therefore plainly bears the burden of proof on the point.

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[13] (...continued)
ance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

[14] *United States v. Lane*, 474 U.S. at 454-55 (Brennan, J., concurring in part and dissenting in part).

[15] In *Olano*, the Court cited *Kotteakos* as authority on the meaning of Rule 52.

C. Cases Under §2254 In Which Petitioners Committed Procedural Default In State Court

The allocation of the burden of proving harmless error to the respondent in habeas corpus is also consistent with this Court's recent decisions on the effect of procedural default in state court. In those cases, the prisoner clearly does bear the burden of establishing both "cause" for the default and "prejudice" from the error that occurred, in some instances *because* of the default. *Coleman v. Thompson*, 501 U.S. __, 111 S.Ct. 2546, 2561-66 (1991).[16] That settled doctrine, however, presupposes that the prisoner does *not* bear the burden of showing prejudice in ordinary cases (like this one) in which a timely and proper objection *was* entered in state court, and there is no suggestion that the prisoner's claim is procedurally barred.[17]

[16] Alternatively, the prisoner may escape forfeiture for default by showing that a district court's failure to consider an error would result in a "miscarriage of justice." *Id.* at 2564.

[17] In some instances, a measure of "prejudice" forms an element of the substantive claim the prisoner wishes to advance. *E.g., Strickland v. Washington*, 466 U.S. 668 (1984)(ineffective assistance of counsel). In those instances, the prisoner does bear the burden of demonstrating "prejudice" as part of his or her affirmative obligation to demonstrate a constitutional violation in the first place. The measure of that "prejudice" is a function of the constitutional right involved. When the Court has recognized "prejudice" elements within substantive claims, it has typically done so after noting the constitutional policies that such an element can serve in the particular context. In this general, harmless error context, however, no such claim-specific policies are promoted by assigning the burden of demonstrating "prejudice" to the prisoner -- as though to attach a "prejudice" requirement with respect to all constitutional claims wholesale. Rather, once a prisoner has successfully made out a meritorious claim (including the establishment of any prejudicial effect required in that connection), the prisoner is not obliged to carry any additional burden of showing "prejudice" within the meaning of the *Brecht/Kotteakos* standard for harmless error.

Simply put, a prisoner who failed to preserve a claim in state court is required to shoulder the special burden of proving prejudice in order to avoid forfeiture -- the typical penalty for procedural default. But a prisoner who properly followed state rules for raising a federal claim is not required to carry any such burden.[18] If the burden allocation with respect to harmless error were otherwise, the system would be unintelligible. A prisoner would be saddled with the burden of establishing some form of prejudice, whether or not he or she complied with state procedures for raising federal constitutional claims.[19]

[18] In this way, the interplay between ordinary habeas cases and habeas cases in which default occurred in state court is a reprise of the interplay between the two parts of Fed.R.Crim.P. 52. Of course, the measure of the "prejudice" that a prisoner who committed default must establish to gain access to the federal forum in habeas corpus has been held to be greater than the measure of "prejudice" that a criminal appellant must establish to win reversal for "plain" error. *United States v. Frady*, 456 U.S. 152 (1982). The issue before the Court today, however, is not the nature or extent of the "prejudice" that a federal habeas court must look for when the respondent contends that conceded constitutional error was harmless, but whether the respondent has the responsibility to show the court where any such "prejudice" lies. The only way to harmonize the harmless error doctrine this Court has now launched for habeas corpus in *Brecht* with the similar doctrines discussed in the text is to place the burden of proof on the party shown to have committed a constitutional violation.

[19] Needless to say, a doctrine of that kind would upset the incentive structure that cases like *Coleman* evidently seek to foster. For prisoners will hardly be moved to enter timely objections in order to avoid having to establish prejudice as a way around forfeiture for default -- if they know that they will have to demonstrate prejudice anyway in order to defeat the respondent's contention that error was harmless.

III. THE CONVENTIONAL ALLOCATION OF THE BURDEN HAS SOUND THEORETICAL AND PRACTICAL FOOTING

In allocating the burden of proving harmless error to the respondent, *Chapman*, *Kotteakos*, and *Brecht* give effect to a familiar proposition with self-evident intellectual power and practicality. The respondent bears the burden because the state benefited from constitutional error at trial and stands to benefit yet again if the case for harmless error is sustained. This allocation makes sense for three reasons.

First, allocating the burden to the respondent promotes a central purpose of the criminal justice system: achieving "accurate determinations of guilt or innocence." *Cf. Brecht*, 113 S.Ct. at 1729 (O'Connor, J., dissenting). By relaxing the standard for determining harmless error in *Brecht*, this Court has already placed more of the risk of an erroneous conviction on the prisoner in custody. By preserving the traditional assignment of the burden of showing harmless error to the respondent, however, the Court ensures that the different standard now in place will not increase that risk beyond tolerable limits.

Second, allocating the burden to the respondent conforms to ordinary litigation convention, by which the party who wishes to persuade a court to act must shoulder the responsibility of demonstrating a good reason for acting. By hypothesis in a harmless error case, the prisoner has already demonstrated that constitutional error occurred at trial, and the respondent seeks to persuade the court to deny relief anyway -- insisting that the error had no serious effect on the verdict. An argument of that kind is a species of defense (in the nature of confession and avoidance), which is forfeited if not raised and pressed at the proper time and in the proper manner.[20]

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[20] *Cf. Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990)(opinion of (continued...)

When a federal court has just found constitutional error and is poised to award relief, it can hardly come as a surprise to state's attorneys attempting to avoid that result that they will be called upon to provide a justification.[21] It makes sense, then, that the respondent must both plead and prove harmless error.[22]

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[20] (...continued)
Easterbrook, J.)(refusing to consider a harmless error argument raised only in a reply brief).

[21] If, by contrast to this settled understanding, the respondent were permitted to save harmless error claims until after other arguments prove insufficient, the processing of habeas corpus cases would be corrupted. *Cf. Granberry v. Greer*, 481 U.S. 129, 132 (1987)(making a similar point as justification for the rule that exhaustion doctrine claims are generally forfeited if not raised in a timely manner).

[22] It is true that in a civil action for damages against an executive officer who relies on qualified official immunity, the plaintiff must plead not only that the defendant violated the plaintiff's rights but that he or she violated "clearly established" law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). If the plaintiff's allegations are insufficient, the defendant is entitled to dismissal prior to discovery and, even if the allegations are adequate, the defendant may obtain summary judgment if discovery fails to reveal a genuine dispute of fact. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). In that limited way, the plaintiff is obliged to plead circumstances that will defeat the defense of qualified immunity.

The resulting departure from conventional burden allocation doctrine has been justified in that context, however, as a corollary to the notion that official immunity may often insulate the defendant from trial altogether. To that end, the cases place an unusual burden on the plaintiff to demonstrate early on that it is essential to conduct a hearing in order to determine whether the defendant actually committed the acts as alleged.

In the harmless error context, by contrast, there is no similar reason to depart from the norm. By hypothesis, a criminal trial has already taken place, and the task at hand is to examine the record of that trial to determine whether a conceded constitutional error had a substantial effect on its outcome. *Lockhart v. Fretwell*, 506 U.S. __, 113 S.Ct. 838, 842-43 n.2 (1993)(noting that harmless error analysis does not (continued...)

Third, allocating the burden to the respondent recognizes that the state has the capacity and incentive to develop the evidence and relevant arguments in order that the court can decide the harmless error question on a complete record. Under the *Kotteakos* standard, just as under the previous standard from *Chapman*, federal district courts search the trial record "*de novo*." *Brecht*, 113 S.Ct. at 1724 (Stevens, J., concurring).[23] They "still must decide whether they have sufficient confidence that the verdict would have remained unchanged even if the error had not occurred." *Id.* at 1731 (O'Connor, J., dissenting). If the district courts are to perform the duties that *Brecht* imposes on them, they need the assistance of state's attorneys who are familiar with individual cases and can lay bare the matters on which sound judgment can safely rest.[24]

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[22] (...continued)
take place until after the court has reviewed the trial record and concluded that constitutional error occurred). At this juncture, there is no justification for requiring the party who has just pleaded and proved a constitutional violation also to allege and prove that that error was prejudicial.

Indeed, given that the harmless error analysis necessarily entails a close examination of the record of the trial in retrospect, *Yates v. Evatt*, 500 U.S. __, 111 S.Ct. 1884, 1894 (1991), it simply will not work to move a showing of the effect of an error from the back end of a case (where the state has traditionally had the burden of making such a *showing*), to the front end (where the prisoner has traditionally had the burden of *pleading* a constitutional violation).

[23] *See United States v. Hasting*, 461 U.S. 499, 516-19 (1983)(Stevens, J., concurring)(explaining the difficulties judges face when they attempt to assess lengthy trial records for harmless error without guidance from state's attorneys).

[24] In many cases, a careful analysis of the harmless error question may turn on whether evidence untainted by constitutional error was so overwhelming that it is extremely unlikely that the verdict would have been different if the error had not occurred. When that kind of intensive investigation is necessary, the state's attorney is clearly the best
(continued...)

IV. AN ALLOCATION OF THE BURDEN TO THE PRISONER WOULD SKEW CONSTITUTIONAL ANALYSIS AND NEEDLESSLY COMPLICATE LITIGATION

A. The Effect On Constitutional Analysis

The circuit court's approach below frankly evokes concern that that court may misinterpret *Brecht* as a mechanism for neglecting the federal courts' core responsibility under the Habeas Corpus Act to redress constitutional error -- the very kind of abdication of responsibility that this Court has twice deflected in recent Terms. *Wright v. West*, 505 U.S. __, 112 S.Ct. 2482 (1992)(declining to hold that the federal habeas courts must defer to previous state judgments applying federal law); *Withrow v. Williams*, 507 U.S. __, 113 S.Ct. 1745 (1993)(declining to exclude *Miranda* claims from the scope of habeas corpus).

This Court decided in *Brecht* that the *Kotteakos* standard for harmless error, if properly administered, is consistent with the established principle of independent adjudication in habeas corpus. By way of reassurance, Justice Stevens made three related points.

First, Justice Stevens made it crystal clear that the federal courts retain the duty to exercise independent judgment regarding the merits of federal claims. Lest anyone think that the different standard for harmless error is meant to resurrect the general rule of deference that failed to find support in *West*, Justice Stevens expressly stated that the *Brecht* decision is consistent with the longstanding responsibility of the federal courts independently to apply federal law to the facts of particular

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[24] (...continued)
cost-avoider and thus should rationally be assigned the responsibility to undertake the task and spread the results before the court.

cases. *Brecht*, 113 S.Ct. at 1724, citing Justice O'Connor's dissent in *West*.[25] *Cf. Lockhart v. Fretwell*, 113 S.Ct. at 842-43 n.2 (confirming that "[h]armless error analysis is triggered only *after* the reviewing court discovers that an error has been committed")(emphasis in original).

Second, Justice Stevens made it clear that the *Brecht* decision gave the federal habeas courts no authority to transmute forthright adjudication of the merits of claims into a "single-minded focus on how the error may (or may not) have affected the jury's verdict." *Brecht*, 113 S.Ct. at 1724. Instead, those courts must conduct a thorough examination of the entire trial record in search of "all the ways that error can infect the course of a trial." *Id*. *Accord id*. at 1731 (O'Connor, J., dissenting). *See also Yates v. Evatt*, 111 S.Ct. at 1894.

Third, Justice Stevens confirmed that the burden of showing harmless error would remain with the prosecution. Plainly, this last element of the equation is vital to the other two. Under the framework Justice Stevens describes, a federal habeas court will ask in the first instance whether a prisoner has met his or her conceded burden of establishing constitutional error. Once the petitioner has carried that burden, the court will turn to the analytically distinct question whether the respondent can demonstrate that the error was harmless.

Assigning the burden with respect to harmless error to the prisoner would risk upsetting this framework in two ways. Initially, it would invite the district court to isolate the two issues in question (the merits of a claim and the harmless error inquiry), but to reverse the order in which they are taken up. Rather than determining at

[25] Justice Stevens pointed out that the opinion filed for the Court by the Chief Justice conducted such an examination in *Brecht* itself -- just as the plurality opinion filed for the Court by Justice Thomas had conducted such an examination in *West*. *Brecht*, 113 S.Ct. at 1724.

the outset whether the prisoner can establish that error occurred, the court might focus on whether the prisoner can show prejudicial effect -- and then proceed to the merits of the claim only after deciding that, if the claim proves to be valid, it will warrant relief. That approach would allow the harmless error analysis to frustrate the federal court's primary responsibility to evaluate a prisoner's substantive legal grounds for obtaining the writ.

Alternatively, such a reallocation of the burden would invite the court to collapse the two issues together. That, in turn, would inject a concern for the possible consequences of error into the threshold question of whether the prisoner can establish a constitutional violation in the first instance -- thus corrupting the determination of federal constitutional rights. In the end, the federal court would not genuinely be identifying and articulating the baseline constitutional violation, but rather would be conducting a loose appraisal of the general regularity of the proceedings in state court. That, of course, would produce the very last thing the Court wants in constitutional cases -- imprecision in the exposition of federal rights.

No such problems would arise if the burden of showing harmless error remains with the respondent -- as *Brecht* plainly intends.[26]

[26] In many instances, the portions of the trial record bearing on the error itself, on the one hand, and the effects of the error, on the other, may be different. This will be true, for example, in cases in which the argument that error was harmless depends on a claim that other, untainted evidence was overwhelming. If the court were to place the burden of showing error and the burden of proving that it was harmful on the prisoner, the court might erroneously neglect portions of the record that relate only to the latter. If, however, the burden of proving harmless error remains with the prosecution, the allocation of burdens itself will serve to channel the court's analysis of the record in the appropriate direction.

B. The Effect On Habeas Litigation

There is no basis for thinking that the distortions that would be spawned by the circuit's reallocation of the burden of proof would be justified by any diminution in the federal courts' workload in habeas corpus or by any advancement in state interests. Instead, imposing the burden on the prisoner would only add to the labors of federal district judges and state's attorneys alike. The district courts need the help they can get from state's attorneys familiar with the trial record and able to develop the evidence and arguments regarding the effect of constitutional error. Prisoners *may* have court-appointed lawyers at this point, but it is unrealistic to think that counsel newly assigned by the federal court to conduct a harmless error proceeding can offer anything like the efficiency of state's attorneys who have followed the case from the outset.

CONCLUSION

For the reasons stated above, the Court should reverse the judgment of the circuit court and remand with instructions to reconsider the petitioner's habeas corpus petition and, in so doing, to allocate the burden of proving that any error was harmless to the respondent.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1993

ROBERT O'NEAL,
Petitioner,

vs.

FRED McANINCH, WARDEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE NATIONAL AND OHIO ASSOCIATIONS OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

DOES THE STATE BEAR THE BURDEN OF PROVING CONSTITUTIONAL ERROR HARMLESS UNDER *BRECHT V. ABRAHAMSON*, 113 S. CT. 1710 (1993)?

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BRIEF OF *AMICI CURIAE* THE NATIONAL AND OHIO ASSOCIATIONS OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

This brief in support of the Petitioner is submitted with the written consent of counsel to the parties, copies of which are filed with the Clerk of the Court.

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (hereinafter NACDL) is a District of Columbia nonprofit corporation whose membership is comprised of more than 7,000 lawyers and 20,000 affiliate members who are citizens of every state. Members serve in positions bringing them into daily contact with the criminal justice system as advocates, law professors, or

judges in state and federal courts. The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

The Ohio Association of Criminal Defense Lawyers (OACDL) is a state-wide organization of more than four hundred fifty (450) attorneys practicing primarily in the field of criminal defense law. The organization is affiliated with the NACDL and it has been formed for charitable, scientific and educational purposes including the proper administration of justice and research in the field of criminal defense law. The membership of the OACDL includes both private practitioners and public defenders many of whom have served as prosecutors.

Both the NACDL and the OACDL believe that the precious constitutional rights of the people must be jealously guarded against encroachment by the government, for a right once lost is never to be regained. The Great Writ of Habeas Corpus is the primary means of redressing constitutional violations. It is the means through which James Madison's vision of an independent federal judiciary to protect the Bill of Rights is to be achieved. But the devil is in the details. Proving the wrong is no longer enough. The question of who must prove the harm or lack thereof could effectively destroy habeas corpus as a means to redress constitutional violations, and a right without a remedy is no right at all. This brief is filed because the Associations believe that federal habeas corpus must remain a viable and effective tool to remedy the constitutional wrongs ignored by state courts.

ARGUMENT

THE STATE BEARS THE BURDEN OF PROVING CONSTITUTIONAL ERROR HARMLESS UNDER *BRECHT V. ABRAHAMSON,* 113 S. CT. 1710 (1993).

I

Harmless error analysis occurs only after the habeas petitioner has borne the initial burden of establishing a constitutional violation. *Lockhart v. Fretwell,* _____ U.S. _____, 113 S. Ct. 838, _____, 122 L. Ed. 2d 180, 189 n.2 (1993). Once constitutional error is proven, the question arises whether the error justifies a retrial. *Brecht v. Abrahamson,* _____ U.S. _____, 113 S. Ct. 1710 (1993) provides part of the answer. Retrial should occur when the constitutional violation substantially affected the outcome of the trial. The question remaining, here presented, is who bears the burden on the "substantial impact" issue. On the basis of equitable concerns, the obvious answer to this question is that the proven wrongdoer should bear the burden.

Habeas corpus is an equitable remedy. *See, Fay v. Noia,* 372 U.S. 391, 438 (1963) (citing *United States ex rel. Smith v. Baldi,* 344 U.S. 567, 573 (Frankfurter, J., *dissenting*)). 28 U.S.C. §2243 mandates that the federal habeas court, ". . . *shall* . . . dispose of the [habeas corpus application] as law *and justice* require." (emphasis added). *See also, Kuhlman v. Wilson,* 477 U.S. 436 444-45 (1986); *Stone v. Powell,* 428 U.S. 465, 492 n.31 (1976); *Sanders v. United States,* 373 U.S. 1, 17 (1969). This Court has noted that, "[h]abeas jurisdiction is tempered by the restraints that accompany the exercise of equitable discretion." *Withrow v. Williams,* _____ U.S.

_____, 113 S. Ct. 1745, 1766 (1992). This important principle has been a consistent and recurring theme in this Court's habeas jurisprudence. *See, e.g., Herrera v. Collins,* _____ U.S. _____, 113 S. Ct. 853, 862 (1993); *McCleskey v. Zant,* _____ U.S. _____, 111 S. Ct. 1454, 1465-68, 1474-75 (1991); *Dugger v. Adams,* 489 U.S. 401, 410 (1989); *Moore v. Zant,* 885 F.2d 1497, 1504 (11th Cir. 1989) (*en banc*), *cert. denied,* 497 U.S. 1010 (1990).

There may be no better example than the case at bar why, for equitable reasons, the state should retain the burden. As he has done so often in the past (*see* note 1, *infra*), the prosecutor in this case appealed to passion and prejudice to arouse emotion and thereby gain a conviction. It is sometimes said that error has "crept" into the trial of a case. Not so the case at bar. It marched into this case like an army with banners and trumpets and with Mr. Marino leading the way. As the Magistrate noted, it was impossible that "O'Neal could have received a fair trial in the emotional atmosphere created by the introduction of unnecessary and gruesome evidence; the evidence of a prior killing [. . .]; the prosecutor's inflammatory argument designed to stir the passions of the jurors [. . .]." Supplemental Report and Recommendation at 7-8 (J.A. 209-10). In this case the prosecutor suggested that the jurors wrap themselves in a blanket and "see what the victim of a murder is like." As the Magistrate correctly observed:

> Had the jury followed this argument literally, one can picture the twelve jurors seated around a conference table in the jury room, each wearing an item of the bloodstained clothing the victim was found in, each in turn lifting the crowbar, while viewing the gruesome photographs of the corpse. In this manner, they would deliberate O'Neal's fate. Such appeals to the juror's passions are unconscionable. They diverted the juror's attention from their task of examining and weighing the evidence objectively, and urged them to convict O'Neal for reasons legally irrelevant to his guilt or innocence. *See United States v. Solivan,* 937 F.2d 1146 (6th Cir. 1991). *Cf. State v. Thompson,* 33 Ohio St. 3d 1, 514 N.E.2d 407, 420-21 (1987). Upon studying the closing argument, it becomes clear that the prosecutor introduced the gruesome evidence for the express purpose of enabling him to make an inflammatory argument at the conclusion of the case.

Magistrate's Report and Recommendation, at 40 (J.A. 150-51).

Justice Frankfurter observed that, "A criminal trial should have the atmosphere of an operating room." *Sacher v. United States,* 343 U.S. 1, 37-38 (1952) (Frankfurter, J., *dissenting*). In this case, however, a more appropriate analogy would be to the atmosphere surrounding the *Geraldo*! show:

> The impartial atmosphere in which the jury should have resolved these issues was destroyed by the needless introduction of gruesome evidence, the prosecutor's inflammatory argument regarding said evidence, the prosecutor's improperly establishing that O'Neal had previously killed a person by shooting him in the head with his revolver, and by the prosecutor's improper suggestion that the previous killing was credible evidence that O'Neal was guilty of Podborny's murder. Additionally, the prosecutor intentionally deprived O'Neal of jurors of his own race to help determine his guilt.

Magistrate's Report and Recommendation at 48-49 (J.A. 161).

It is a strange thing to suggest that the state has an interest in protecting a conviction achieved as this conviction was through violations of those federal constitutional rights designed to insure a fair trial and a

reliable result. The state has no such interest. Some individuals serving as attorneys for the state might have such an interest, but society demands fair trials which achieve just and reliable results.

II

Relevant policy considerations in addition to the equities support an allocation of the burden of proving harmlessness to the wrongdoer. Serious constitutional error affects the reliability of the fact finding process. Such error lessens reliability in ways that may not be immediately apparent upon review of a cold record by an appellate or quasi-appellate court. Often serious constitutional violations result in evidence not appearing in the record thereby falsely enhancing the appearance of strength of the state's case. The absence of one or two facts can dramatically alter the appearance of guilt. It is a great mistake to decide the result of a case on review based upon a belief in the probable guilt of the accused when serious constitutional error is present. It may be that very constitutional error that gives rise to the appearance of probable guilt. This is, of course, a natural and understandable tendency in appellate judges but, nevertheless, one which must be guarded against with vigilance and vigor. The greatest of these safeguards is the allocation of the burden of proof of harmlessness in the presence of serious constitutional error. *Kotteakos v. United States*, 328 U.S. 750 (1946), reduced the standard of error in such cases, although the degree to which the standard has been lessened is unclear. It would be a far more serious mistake to change the traditional allocation of the burden of proof of harmlessness, and it would be a mistake which would advance no legitimate interest. Comity does not require this nor is it required by any principle of federalism. The ordinary citizen walking

down the street would not understand this to be a fair thing. A rule which would allow the party causing the constitutional error to benefit from it by placing the burden of proving harmlessness upon the injured party is simply unfair.

It would also encourage the commission of constitutional error. Attorneys want to win cases. Of course, the job of a prosecuting attorney is far different from that of defense counsel. As noted in *Berger v. United States*, 295 U.S. 78, 88 (1935), "the duty of the prosecutor is to seek justice, not merely to convict." Unfortunately these noble words are sometimes honored in the breach. Some prosecutors fail to develop a sense of justice that recognizes anything other than a conviction as a service to society.[1] It is an easy thing to view a criminal trial as a sporting contest where, as in the words of Justice Fortas, the defendant is a piece in a game of chess. *Giles v. Maryland*, 386 U.S. 66, 100 (1967), (Fortas J., *concurring*). *See also* Brennan, *The*

[1] The prosecutor in this case is just such a prosecutor. He has committed misconduct amounting to constitutional error warranting reversal in at least three prior cases. *See State v. Liberatore*, 69 Ohio St. 2d 583, 433 N.E.2d 561 (1982) ("... the prosecution presented a textbook example of what a closing argument should not be. [...] This thoroughly unprofessional conduct prejudiced the defendant's rights to such an extent as to require reversal."); *State v. Keenan*, 66 Ohio St. 3d 402, 613 N.E.2d 203 (1993) ("To declare as nonprejudicial the conduct of the assistant prosecutor in this case would be to announce a new standard for the prosecution of death penalty cases—a standard that falls dramatically short of that which is guaranteed to any person accused of a capital crime by both the Ohio and United States Constitution."); *State v. Hedrick* (Dec. 20, 1990) Cuy. App. No. 57844, *unreported*, 1990 WL 209885 (improper closing argument, comment on the defendant's failure to testify, comment on matters outside the record, improper bolstering of prosecution witness credibility held not "harmless beyond a reasonable doubt"). *State v. Hedrick* is on file with the Clerk.

Criminal Prosecution: Sporting Event Or Quest For Truth? 1963 Wash. U.L.Q. 279, 292. Where serious constitutional error is present it is likely that the prosecutor has failed to live up to the *Berger* standard. When this happens it falls upon the federal courts to enforce the Bill of Rights against the states and in favor of the citizen accused. This is the traditional role of the federal habeas courts. It is the role that James Madison assumed that the federal courts would play in our federalist system of government. But it is a role which will be forfeit if the burden of proof of harm is allocated to the party that suffered the harm.

III

Brecht v. Abrahamson, _____ U.S. _____, 113 S. Ct. 1710 (1993) changed the substantive standard for assessing the harmlessness of constitutional error in habeas corpus proceedings. *Brecht* did not, however, change the allocation to the state of the burden of proving harmlessness. There are five reasons why the majority opinion in *Brecht* cannot be read to assign the burden of proof to the habeas petitioner.

In the first place, the majority opinion does not contain a single word or any passage devoted expressly to the allocation of the burden of proof. Second, other parts of the majority opinion stand for the proposition that issues not "squarely addressed" by this Court should not be taken as decided. *Brecht, supra*, 113 S. Ct. at 1718 (majority opinion). Third, the majority opinion clearly acknowledged the difference between the "*Chapman* [*v. California*, 386 U.S. 18 (1967)] standard for determining whether a conviction must be set aside because of federal constitutional error [. . .]" and *Chapman's* allocation of the "burden of proving that an

error passes muster under this standard," which, as the court noted, "[t]he state bears." *Brecht, supra*, 113 S. Ct. at 1717. At every critical juncture the distinction is made between the standard which is changed and the allocation of the burden which is not. *Id.* at 1714, 1718, 1721-22. Fourth, Justice Stevens explicitly stated that he would not have joined the majority opinion, except for his understanding that the opinion placed the burden of proof upon the state. *Brecht, supra*, 113 S. Ct. at 1713 (Stevens, J., *concurring*). Fifth, five justices—Justice Stevens in a concurring opinion and Justices White, Blackmun, O'Connor, and Souter in dissenting opinions—explicitly endorsed harmless error rules allocating the burden of proving harmlessness to the state. *See Brecht, supra*, 113 S. Ct. at 1723-24 (Stevens, J., *concurring*); *Id.* at 1727 (White, J., *dissenting*, joined by Blackmun and Souter, J.J.); *Id.* at 1729 (O'Connor, J., *dissenting*).

What this Court did in *Brecht* regarding allocation of the burden should not be changed in the case at bar. There is no good legal reason for imposing upon the petitioner the burden of proving harmful constitutional error committed by the state. Indeed, there are compelling reasons to the contrary.

Justice Blackmun has aptly encapsulated the law governing the allocation of the burden of harmlessness under *Kotteakos* and the other authoritative sources to which *Brecht* refers:

> Every harmless error standard that this Court has employed . . . shares two salient features . . . [the first being that,] once serious error has been identified, the burden shifts to the beneficiary of the error to show that the conviction was not tainted.

Darden v. Wainwright, 477 U.S. 168, 197 (1986) (Blackmun, J., *dissenting*).

Chief among the Court's cases that have allocated the burden of proving harmlessness to the wrongdoer is *Kotteakos v. United States*, 328 U.S. 750 (1946), the very decision from which *Brecht* adopted the harmless error standard that now is to apply in habeas corpus proceedings. As to all constitutional error and much nonconstitutional error—*i.e.*, as to all errors save those that are merely "technical"—*Kotteakos* expressly concluded that "the burden of sustaining a verdict will . . . rest upon the one who claims under (the tainted verdict)." *Id.* at 760-61. *See Brecht v. Abrahamson*, 113 S. Ct. at 1723 (Stevens, J., concurring) ("[In deciding] what the collateral attack standard should be for . . . [trial] error . . . the Court endors[es] Justice Rutledge's thoughtful opinion for the Court in *Kotteakos* . . . . Because that standard . . . places the burden on prosecutors to explain why those errors were harmless . . ., I am convinced that our [holding] is correct.").

It seems a simple matter of fairness and common sense to allocate the burden of proving error harmless to the one who caused the error in the first place. If the state as a litigant benefits through deprivation of a constitutional right of a defendant, then society demands that the state as a litigant bear the burden of proving the error harmless. Society as a whole has as much concern about the fairness of the criminal justice system as it does with the result thereof. Our government rules at the sufferance of the people. Therefore, its interest in governing fairly and impartially is as compelling as its interest in governing at all. *See Berger v. United States*, 295 U.S. 78, 87 (1935). The very suggestion that the prosecutor, as representative of such a sovereign, could first violate the constitutional rights of the citizen accused, benefit therefrom by gaining a conviction and

then demand that the burden of proving prejudice be allocated to the party who has been harmed flies in the face of fundamental fairness.

Besides *Kotteakos* there are only five potential sources of an allocation of the burden of proof that *Brecht* could be viewed as endorsing. The first is this Court's decision in the *United States v. Lane*, 474 U.S. 438 (1986), the second is the harmless error provision in Rule 52(a), Federal Rules of Criminal Procedure, the third is the Federal Harmless Error Statute, 28 U.S.C. §2111, the fourth is *Chapman v. California* and the fifth is an analogy to the other defenses to habeas corpus relief that the Court has recognized. All five of these authorities either cycle the analysis directly back to *Kotteakos* or independently allocate the burden to the state.

The discussion of *United States v. Lane* in *Brecht* was in reference to the *Kotteakos* standard of review. 474 U.S. at 449. *Lane* does not discuss the allocation of the burden of proof but only the standard of proof. The standard which *Lane* discusses is the *Kotteakos* standard:

> The test under *Kotteakos* is whether the error "had substantial and injurious effect or influence" in determining the jury's verdict.

474 U.S. at 449 (quoting 328 U.S. at 776).

Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to relief based on trial error unless the error resulted in "actual prejudice." *See United States v. Lane*, 474 U.S. at 449. It is clear from the page in *Lane* that *Brecht* cites and it is clear from *Brecht* itself that "actual prejudice" refers to the standard of review and not the allocation of the burden:

> The *Kotteakos standard* is thus better tailored to the nature and purpose of collateral review, and more likely to promote the considerations underlying our recent habeas cases.

Brecht v. Abrahamson, supra, 113 S. Ct. at 1721-22 (emphasis added).

Brecht cites *Lane* in order to explain the *Kotteakos* standard. *Lane* is not cited to elucidate the allocation of the burden of persuasion once substantial error is shown to exist.

Rule 52(a), Federal Rules of Criminal Procedure has been traditionally and authoritatively interpreted as placing the burden of proving harmlessness upon the government. *See* 3A C. Wright, *Federal Practice & Procedure: Criminal 2D* §854, at 304 & n.17 (1982). *See also, United States v. Olano,* _____ U.S. _____, 113 S. Ct. 1770, 1777-78, 1781, 1782 (1993).

28 U.S.C. §2111 states in relevant part that, "on the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." This statute, as was true with Criminal Rule 52(a), states the standard of review in terms of a negative showing that the state, not the petitioner, would be expected to make. This Court has treated §2111 and Rule 52(a) similarly and construed both as requiring the government to show "the absence of prejudice." *United States v. Olano,* 113 S. Ct. at 1778, 1781. *See also, United States v. Lane,* 474 U.S. at 454-55 (Brennan, J., concurring in part and dissenting in part). Of course, *Kotteakos* itself construed the then existing harmless error statute, and it is clear beyond argument that *Kotteakos* allocated the burden to the government. Perhaps the simplest means of discerning who has the burden is by discerning who loses

in the event of a tie. According to both *Kotteakos* and *Lane* the government loses. *See Lane,* 474 U.S. at 449 (quoting *Kotteakos,* 328 U.S. at 765).

Chapman v. California reached the same conclusion in its discussion of the allocation of the burden of proof, which unlike its discussion of the standard of proof, had recourse to *Kotteakos* and the entire American Common Law tradition in regard to harmless error:

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.

Chapman v. California, supra, 386 U.S. at 24 (citing 1 Wigmore, *Evidence* §21 (3d ed. 1940)).

Finally, in applying the other habeas corpus defenses that this Court and Congress have devised in service of those same jurisprudential interests and policy considerations (*e.g.,* exhaustion of state remedies, nonretroactivity and procedural default) this Court and the lower federal courts have repeatedly recognized that interests of finality, comity, and federalism do not justify absolving the responding party of its traditional burden of pleading and proving the defenses upon which it relies. *See, e.g., Godinez v. Moran,* _____ U.S. _____, 113 S. Ct. 2680 (1993) (state waived *Teague* defense); *Granberry v. Greer,* 481 U.S. 129, 134 (1987) (state has a duty to advise the district court of nonexhaustion defense); *Estelle v. Smith,* 451 U.S. 454, 468 n.12 (1981) (failure to timely assert state procedural bar waives the defense); *Sanders v. United States,* 373 U.S. 1, 11 (1963) (government can waive abuse of writ defense).

CONCLUSION

When a habeas petitioner has shown that his or her trial has fallen below the constitutional standard, then that conviction should and must be set aside unless the state can make a compelling showing that the error was harmless and did not substantially affect the outcome of the trial. Any other allocation of the burden would be sheer folly.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT O'NEAL, PETITIONER

v.

FRED MCANINCH, WARDEN

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR TIMOTHY SCOTT SHERMAN AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the prosecution bears the burden of showing on collateral review that a constitutional error in a criminal trial was harmless.

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On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF FOR TIMOTHY SCOTT SHERMAN AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

Timothy Scott Sherman was convicted in Maryland state court in 1988 of two counts of first-degree murder and was sentenced to consecutive terms of life imprisonment. His trial, however, was tainted by an error of constitutional magnitude: during the trial, one of the jurors conducted his own unsupervised inspection of the crime scene and of a "key" piece of evidence in the case: a pine tree in which the murder weapon was found. *Sherman* v. *Smith*, 1993 WL 433317, *2 (4th Cir. Oct. 27, 1993) (unpublished).

On direct appeal, the state courts failed to recognize the constitutional dimension of the juror site visit, and thus

erroneously required Mr. Sherman to establish prejudice rather than requiring the State to prove beyond a reasonable doubt that the constitutional error was harmless. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). This Court denied a petition for certiorari, but two Justices recorded dissents from the denial. *Sherman* v. *Maryland*, 498 U.S. 950 (1990). Mr. Sherman then filed a habeas corpus petition in federal district court.

The district court denied the petition, but the Fourth Circuit vacated and remanded, directing the district court to determine whether the admitted constitutional violation was structural error or trial error, and, if trial error, whether the error could be deemed harmless. 1993 WL 433317, *4. In doing so, the Fourth Circuit ruled that, under *Brecht* v. *Abrahamson*, 113 S. Ct. 1710 (1993), and *Kotteakos* v. *United States*, 328 U.S. 750 (1946), the burden is on the State to show that the trial error was harmless. 1993 WL 433317, *4.

The disposition of Mr. Sherman's habeas petition, which is currently pending in the district court on remand from the Fourth Circuit, could be affected by the Court's ruling in this case. Mr. Sherman therefore has an interest in preserving the ruling of the Fourth Circuit by supporting reversal of the contrary decision below in this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The long history of harmless-error jurisprudence, both in England and in America, has seen many doctrinal shifts, but one principle has remained clear throughout: once a party establishes that his trial was infected with error, it is his adversary — as the beneficiary of the error — who must bear the burden of demonstrating that the error was harmless. The

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

sole exception to that principle has been that a party asserting a merely "technical" error relating to the etiquette or procedural minutiae of a trial must demonstrate that the technical error caused harmful effects.

This Court has adhered to the traditional dichotomy between "technical" errors and errors that, by their nature, tend to affect substantial rights. Furthermore, this Court's precedents indicate that a trial error of constitutional dimension can never be deemed a trifling "technical" error. The rights protected by the Constitution are inextricably intertwined not only with the most basic standards of liberty and due process, but also with the reliability of the jury's determination of guilt or innocence. Judgments in cases where constitutional protections were violated are inherently suspect. For this reason, it has always fallen to the party seeking to justify such judgments to demonstrate that the constitutional error was harmless.

The same principle has held true on both direct and collateral review of criminal convictions. See *Chapman* v. *California*, 386 U.S. at 24 (State bears the burden of showing that a constitutional error was harmless on direct review); *Yates* v. *Evatt*, 500 U.S. 391, 407-411 (1991) (State bears the burden of showing that a constitutional error was harmless on collateral review); *Rose* v. *Clark*, 478 U.S. 570, 583-584 (1986) (same); *Milton* v. *Wainwright*, 407 U.S. 371, 377-378 (1972) (same). The court below, however, inverted the historic harmless-error analysis by placing *on the defendant* the burden of proving not only that a constitutional error occurred, but also that the error prejudiced or influenced the verdict against him. *O'Neal* v. *Morris*, 3 F.3d 143, 145 (6th Cir. 1993).

The holding below misinterprets this Court's recent decision in *Brecht*, which explicitly adopted the *Kotteakos* harmless-error analysis, which in turn applied the traditional rule that the beneficiary of a non-technical error must prove

that the error was harmless. The decision below also collapses the longstanding distinction between technical and constitutional errors. Consequently, this Court should reverse the decision below and reaffirm the bedrock principle that the State bears the burden of showing — even under the relaxed harmlessness standard applicable on collateral review — that a constitutional error was harmless.

ARGUMENT

THE STATE BEARS THE BURDEN IN HABEAS CORPUS CASES OF SHOWING THAT A CONSTITUTIONAL ERROR WAS HARMLESS

"Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean." *Chapman* v. *California*, 386 U.S. at 21; accord *Rushen* v. *Spain*, 464 U.S. 114, 120 (1983) (per curiam) ("The final decision [in a habeas case] whether the alleged constitutional error was harmless is one of federal law.").

Until 1993, it was generally accepted that the question of harmlessness, because it is a question of federal law, would be resolved under exactly the same standards in a habeas case as in a direct appeal from a federal conviction or in a case arising in this Court on direct review of a state conviction. See *Brecht*, 113 S. Ct. at 1718 ("we have applied the *Chapman* standard in a handful of federal habeas cases"). The Court in 1993, however, decided that a different standard was appropriate for habeas cases (and of course we do not quarrel with that determination). But the important point for present purposes is that, in setting a new standard, the Court did not simply invent a new approach. Rather, it borrowed an *established* approach from another context, *i.e.*, the review of *nonconstitutional* errors on direct federal review. See *Kotteakos* v. *United States*, *supra*; *Brecht*, 113 S. Ct. at 1722 ("The *Kotteakos* standard, we believe, fills the bill.").

Rather than send the federal courts into uncharted territory, the Court believed it important that, "because the *Kotteakos* standard is grounded in the federal harmless-error rule (28 U.S.C. § 2111), federal courts may turn to an existing body of case law in applying it." 113 S. Ct. at 1722.

History, then, is the most important guidepost for this Court in resolving the allocation-of-burden issue presented in this case. As we will now demonstrate, the burden of showing the harmlessness of a constitutional error has *always* rested on the prosecution. Even for nonconstitutional errors, *Kotteakos* itself places the burden on the prosecution. 328 U.S. at 760-761; see *Brecht*, 113 S. Ct. at 1723-1724 & n.1 (Stevens, J., concurring). Only by inventing a new approach out of whole cloth for habeas cases could this Court place the burden on a habeas petitioner to *disprove* harmlessness.[2]

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[2] By this statement, we mean no disrespect to the Chief Justice's passing statement, in the opinion for the Court in *Brecht*, 113 S. Ct. at 1722 (emphasis added), that "habeas petitioners * * * are not entitled to habeas relief based on trial error unless *they* can establish that it resulted in 'actual prejudice.'" We mean simply that the allocation-of-burden issue was not before the Court in *Brecht*, so the quoted statement cannot be taken as authoritative. As *Brecht* itself reminds us, when the Court has "never squarely addressed [an] issue," but has "at most assumed the applicability" of a particular standard, the Court in a later case is "free to address the issue on the merits." *Id.* at 1718; accord, *e.g.*, *Daniels* v. *Williams*, 474 U.S. 327, 330-331 (1986) (overruling preliminary remark in prior case while adhering to core holding of that case). Certainly, the quoted statement in *Brecht* cannot be taken as an authoritative holding when only five Justices joined the majority opinion and one of those five Justices expressly joined on the premise that the standard the Court was adopting "places the burden on prosecutors to explain why * * * errors were harmless." 113 S. Ct. at 1723 (Stevens, J., concurring).

I. THE HARMLESS-ERROR DOCTRINE HAS TRADITIONALLY ALLOCATED TO THE BENEFICIARY OF A TRIAL ERROR THE BURDEN OF SHOWING THAT THE ERROR WAS HARMLESS

1. Dean Wigmore has traced the application of the harmless-error doctrine in criminal cases back to the 1700s. 1 WIGMORE ON EVIDENCE § 21, at 884-885 (Tillers rev. 1983). The early cases do not clearly indicate which party bore the burden of showing the effect of an error. In *Tinkler's Case*, Russ. & Ry. 133, 133 n. (Cr. Cas. Res. 1781), the court upheld a conviction despite the introduction of improper evidence on the ground that "ample" evidence supported the verdict; see also *Rex* v. *Ball*, Russ. & Ry. 132, 168 Eng. Rep. 721 (Cr. Cas. Res. 1807) (guilty verdict can be sustained despite trial error where the "weight of the evidence" left the court with "no doubt of the guilt of the prisoner"). Those cases did suggest, however, that the courts looked to whether the prosecution, which of course bore the burden of proof at trial, had adduced evidence sufficient to overcome the taint of the error.

The nature of harmless-error review changed radically in the 1830s, when, following the lead of the Court of Exchequer decision in *Crease* v. *Barrett*, 1 C.M. & R. 919, 149 Eng. Rep. 1353, 1359 (Ex. 1835), the rule in England came to be that virtually any error in a criminal case required acquittal on appeal, and any error in civil cases required a new trial. *Regina* v. *Gibson*, 16 Cox Cr. Ca. 181, 18 Q.B.D. 537, 541 (1887) (Coleridge, C.J.). The only burden on the appellant was to establish that an error had occurred. The rationale for this rule was that judicial weighing of evidence to ascertain the effect of an error on the verdict would usurp the jury's role as factfinder. 1 WIGMORE, *supra*, § 21, at 889. This "Exchequer rule" found widespread acceptance in the United States courts. *Id.* at 888-889; R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 13

(1970); *Ninth Annual Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation*, 2 A.B.A.J. 603, 605 (1916) (*Special Committee Report*). Thus, this Court stated in *Waldron* v. *Waldron*, 156 U.S. 361, 380 (1895), that "[i]t is elementary that the admission of illegal evidence, over objection, necessitates reversal."

2. Although the "Exchequer rule" of harmless error was repudiated in England by the Judicature Act of 1873 (36 & 37 Vict., c. 66, rule 6, sched. 1),[3] it continued to be applied in the United States into the 1900s. The rule came under attack, however, as its "lamentable" results (1 WIGMORE, *supra*, § 21, at 891) became clear: too many criminal convictions were being reversed for "technicalities" that bore no relation to the defendants' substantial rights or to the merits of the cases. Wigmore, *Criminal Procedure: "Good" Reversals and "Bad" Reversals*, 4 ILL. L. REV. 352, 354 (1909); *Special Committee Report* at 606; Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP., Pt. 1, 395 (1906). For example, in *People* v. *St. Clair*, 56 Cal. 406 (1880), the court overturned a larceny conviction on appeal because the letter "n" was omitted in the word "larceny" in the indictment; the court reasoned that there was no such crime as "larcey."[4]

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[3] By its terms, the Judicature Act applied only to civil actions. But, despite that limitation, criminal courts in England also abandoned the "Exchequer rule" in favor of an inquiry into the strength of the prosecution's case against the defendant. 1 WIGMORE, *supra*, § 21, at 898 n.17.

[4] Similarly, in *Williams* v. *State*, 27 Wis. 402 (1871), the court reversed a conviction because the indictment stated that the offense was "against the peace of the State" instead of "against the peace *and dignity* of the State" (quoted in R. TRAYNOR, *supra*, at 85 n.3).

In response to the perception that appellate courts had become "impregnable citadels of technicality" (Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A.J. 217, 222 (1925)), and after "long agitation under distinguished professional sponsorship" (*Kotteakos*, 328 U.S. at 758), Congress enacted legislation designed to prevent reversals based solely on technical grounds. The Act of February 26, 1919, codified at the time of *Kotteakos* as 28 U.S.C. § 391 (now slightly reworded as 28 U.S.C. § 2111), provided that on appeal of any case, civil or criminal,

> the court shall give judgment after an examination of the entire record before the court, *without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties*. [Emphasis added.]

The wording of the statute expressly adopts the traditional distinction between technical errors and errors affecting substantial rights.

Significantly, Congress did *not* intend to weaken the vital role of appellate courts in protecting criminal defendants whose trials were tainted by errors that implicated substantial rights. To that purpose, the legislative history "stated authoritatively" that the party seeking to uphold a tainted verdict must bear the burden of proving that the error was harmless unless the error complained of was merely "technical" in nature:

> The proposed legislation affects only technical errors. If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, *the burden of sustaining a verdict will, notwithstanding this legislation[,] rest upon the one who claims under it*.

Kotteakos, 328 U.S. at 760 (quoting H.R. Rep. No. 913, 65th Cong., 3d Sess. 1 (1919)) (emphasis added). The legislative history also shows that the bill "went through many revisions, largely at the instance of the Senate, because there was fear of too easy relaxation of historic securities thrown around the citizen charged with crime." *Kotteakos*, 328 U.S. at 762 (footnote omitted). Thus, it is clear that, under former Section 391, the burden of showing that an error affecting the "historic securities" that safeguard criminal defendants was harmless remained with the prosecution.

3. This Court has on several occasions confirmed that the prosecution bears the burden of proving that non-technical trial errors were harmless. In *Bruno* v. *United States*, 308 U.S. 287 (1939), the Court reversed a conviction for conspiracy to violate the narcotics laws because the trial court had erroneously refused to include a requested instruction in the jury charge. Justice Frankfurter, writing for the Court, ruled that the error was not "technical" because the requested instruction — telling the jury that a defendant's decision not to testify does not create any presumption against him — reflected a statutory right granted to criminal defendants by Congress. 308 U.S. at 292-293. Although the Court declined to provide an "abstract, inclusive definition of 'technical errors,'" it relied on "what every student of the history behind the Act of February 26, 1919, knows, that *that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure* from touching the merits of a verdict." *Id.* at 293-294 (emphasis added). Similarly, in *Weiler* v. *United States*, 323 U.S. 606, 611 (1944), the Court reversed a perjury conviction on the ground that the trial court's refusal to instruct the jury on a common law rule relating to perjury was more than a "technical" error.

The crucial point of *Bruno* and *Weiler* is that violations of a right conferred by a federal statute in the one case, and of a common law right in the other, were held not to be

"technical" errors. It follows *a fortiori* that a right protected by the Constitution itself also cannot be considered "technical" and that, consequently, the burden should stay with the prosecution to show that trial errors affecting constitutional rights were harmless.

II. THIS COURT'S DECISIONS IN *KOTTEAKOS* AND *CHAPMAN* CONFIRM THAT THE PROSECUTION MUST BEAR THE BURDEN OF SHOWING THAT A CONSTITUTIONAL ERROR WAS HARMLESS

1. In *Kotteakos* v. *United States*, the Court provided a searching and comprehensive interpretation of the federal harmless-error statute. Construing the language of former Section 391, the Court held that reversals for trial errors should occur only if the errors "had [a] substantial and injurious effect or influence in determining the jury's verdict." 328 U.S. at 776. The Court discussed at length which party bears the burden of proving harmlessness under this standard. Relying on the statute's legislative history and the circumstances surrounding its enactment, the Court squarely placed the burden on the prosecution to prove that non-technical trial errors were harmless. *Id.* at 765. In so doing, the Court adhered to the historic principle of requiring the party seeking to uphold a verdict to show that any non-technical error was harmless, and of resolving all doubts in favor of the party who has, by definition, already proved that such an error infected his trial. Furthermore, the Court suggested that errors transgressing "constitutional norm[s]," or even statutory rights, may still require reversal per se. *Id.* at 764-765.

2. In the wake of *Kotteakos*, it was still presumed that constitutional errors mandated reversal per se. 3A C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 855, at 325 (1982). But in *Chapman* v. *California*, this Court concluded that "there may be some constitutional errors which in the setting of a particular case are so unimportant and

insignificant that they may, consistent with the Federal Constitution, be deemed harmless." 386 U.S. at 22. The Court did not, however, equate "unimportant and insignificant" constitutional errors with the pre-existing concept of "technical" errors.[5] To the contrary, the Court held that even "insignificant" constitutional errors warranted placing the burden on the prosecution to prove "beyond a reasonable doubt" that the error did not contribute to the verdict:

> Certainly error, constitutional error * * * casts on someone other than the person prejudiced by it a burden to show that it was harmless. It was for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.

386 U.S. at 24.

The Court's insistence that the prosecution disprove the harmfulness of a constitutional error is consistent with the common law and statutory tradition it invoked, and suggests strongly that constitutional errors are never technicalities. Trivial errors that by their nature do not tend to compromise substantial rights do not rise to the level of constitutional error. See, *e.g.*, *Perry* v. *Leeke*, 488 U.S. 272 (1989). But when a defendant can show that his trial was infected by an error of constitutional magnitude, the burden should fall on

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[5] *Chapman* alludes to 28 U.S.C. § 2111, the statutory successor to 28 U.S.C. § 391. Although § 2111 deleted the term "technical" from the statute, it "did not alter the substantive legal test" (*United States* v. *Lane*, 474 U.S. 438, 454 (1986) (Brennan, J., concurring in part and dissenting in part)) requiring the prosecution to show that an error did not affect a defendant's substantial rights. See also *Brecht*, 113 S. Ct. at 1718 n.7.

the State to justify the continued imprisonment of a person whose fundamental protections were violated.

III. THE *BRECHT* DECISION DID NOT DISTURB THE LONGSTANDING PRINCIPLE THAT THE STATE BEARS THE BURDEN OF SHOWING THAT A CONSTITUTIONAL ERROR WAS HARMLESS

1. In *Brecht*, the Court limited use of the *Chapman* "beyond a reasonable doubt" harmless-error standard to cases arising on direct review, holding that the "less onerous standard" articulated in *Kotteakos* is appropriate for collateral review of constitutional errors. 113 S. Ct. at 1721-1722.[6] Quoting *Kotteakos*, the Court stated that in habeas corpus proceedings the new standard for evaluating constitutional errors was "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 1722.

The Court in *Brecht* fully incorporated the *Kotteakos* doctrine for collateral review of constitutional errors, and acknowledged that *Kotteakos* "is grounded in the federal harmless-error [statute] (28 U.S.C. § 2111)." 113 S. Ct. at

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[6] A principal justification for employing a lower standard on collateral review is that the state courts will already have applied the *Chapman* test on direct review, requiring the State to demonstrate beyond a reasonable doubt that the constitutional error did not contribute to the verdict. *Brecht*, 113 S. Ct. at 1721 ("it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review"). But when the state courts have failed to use the *Chapman* test, federal habeas courts must use the *Chapman* standard rather than the *Kotteakos* standard to assure adequate protection to a criminal defendant's constitutional rights. *Orndorff* v. *Lockhart*, 998 F.2d 1426, 1430 (8th Cir. 1993), cert. denied, 62 U.S.L.W. 3701 (U.S. April 25, 1994) (No. 93-1012).

1722. Indeed, as the Court explicitly stated, a principal benefit of adopting the *Kotteakos* analysis in habeas proceedings is that "federal courts may turn to an existing body of case law in applying it." *Ibid.* Consequently, the logic of the Court's decision imports into harmless-error analysis on collateral review not only the legislative purposes reflected in that case law, but also the prosecution's burden of showing that an error was harmless.

Foremost among the policies governing federal harmless-error review is the need to preserve the "historic securities" that protect persons accused of crimes. *Kotteakos*, 328 U.S. at 762. Thus, under *Kotteakos*, the *only* time a defendant must bear the burden of showing that an error was harmful is when the asserted error was a mere "technicality," that is, if it "concerned * * * the mere etiquette of trials [or] the formalities and minutiae of procedure." *Bruno*, 308 U.S. at 294. In all other cases, when the nature of the error implicates substantial rights, the State must prove that a conviction should stand despite the presence of error.

The vast majority of the errors cognizable in habeas corpus proceedings are federal constitutional errors, which implicate issues that transcend trial "etiquette" or procedural minutiae. Indeed, the protections guaranteed by the Constitution represent "a profound judgment about the way in which law should be enforced and justice administered." *Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968). Violations of constitutional norms naturally tend to affect a defendant's substantial rights. *Kotteakos*, 328 U.S. at 764-765. It is for this reason that Justice Stevens observed correctly that "[a] constitutional violation, of course, would never fall into the 'technical' category" under *Kotteakos* (*Brecht*, 113 S. Ct. at 1723-1724 (concurring opinion)), and thus could never justify forcing the aggrieved party to demonstrate the harm. Thus, the *Kotteakos* standard as adopted in *Brecht* still "places the burden on prosecutors to explain why [constitutional] errors

were harmless" (*id.* at 1723) and accords with the historic harmless-error doctrine.

2. An opinion handed down only days after *Brecht* confirms that the beneficiary of an error generally bears the burden of disproving harm. In *United States* v. *Olano*, 113 S. Ct. 1770 (1993), the Court discussed the difference between "harmless error" under Fed. R. Crim. P. 52(a) and "plain error" under Fed. R. Crim. P. 52(b). Although both provisions consider the impact of an error on "substantial rights," the difference arises with regard to the burden of persuasion. Thus, the prosecution "bears the burden of persuasion with respect to prejudice" under the harmless-error rule, but the burden shifts to the defendant when an objection was not properly preserved at trial and the asserted error is therefore reviewed for plain error under Rule 52(b) (113 S. Ct. at 1778):

> This burden-shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: while Rule 52(a) precludes error-correction only if the error "does *not* affect substantial rights" (emphasis added), Rule 52(b) authorizes no remedy unless the error *does* "affec[t] substantial rights."

The decision in *Olano* is particularly instructive in the present context because the Court tied the burden of persuasion to the language of Rule 52(a), which is identical to the language in the federal harmless-error statute construed in *Kotteakos*. This Court has noted the similarities in history and language between Rule 52(a) and 28 U.S.C. § 2111, and has "[i]nvok[ed] the *Kotteakos* test" in holding that Rule 52(a) requires reversal when an error "had substantial and injurious effect or influence in determining the jury's verdict." *United States* v. *Lane*, 474 U.S. at 449 (quoting *Kotteakos*, 328 U.S.

at 776).[7] By stating clearly that the prosecution bears the burden of showing that an error did not affect substantial rights, this Court reaffirmed the traditional harmless-error analysis and burden allocation. Thus, *Olano* confirms the correctness of Justice Stevens' statement in his *Brecht* concurrence that *Brecht* did not invert the burden of persuasion under *Kotteakos* when it adopted that test for collateral review.

3. Despite the clear rule under *Kotteakos* that the prosecution must demonstrate the harmlessness of all but technical errors, the courts of appeals are divided — even among panels within the same circuit — over which party bears the burden of persuasion with respect to constitutional errors under *Brecht-Kotteakos*. Significantly, many courts (including panels that have delved beneath the surface of *Brecht* and have grappled with the holding of *Kotteakos* itself) have concluded that the burden of persuasion still lies with the prosecution to show that constitutional error was harmless. *United States* v. *Savage*, 1994 WL 121003, *5 n.3 (4th Cir. April 11, 1994); *Ortiz* v. *Dubois*, 19 F.3d 708 (1st Cir. 1994); *Stoner* v. *Sowders*, 997 F.2d 209, 213 (6th Cir. 1993); *Lowery* v. *Collins*, 996 F.2d 770, 772 (5th Cir. 1993); *Sherman* v. *Smith*, 1993 WL 433317, *4.

By contrast, those decisions that have reversed the burden of persuasion contain no analysis of *Kotteakos* and give no consideration to the historic principle that the prosecution bears the burden of persuasion with respect to all but "technical" errors. Instead, they simply recite a dictum from the *Brecht* opinion (113 S. Ct. at 1722) to the effect that

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[7] See also *Lane*, 474 U.S. at 454-455 (Brennan, J., concurring in part and dissenting in part) (the federal harmless-error statute was "incorporated" into Rule 52(a)); Advisory Committee's Notes on Fed. R. Crim. P. 52(a), 18 U.S.C. App., p. 657 (Rule 52(a) is a "restatement of existing law," citing the harmless-error statute).

habeas petitioners are not entitled to relief unless "they can establish" that the constitutional error was harmful. See, *e.g.*, *Kyles* v. *Whitley*, 5 F.3d 806, 818 (5th Cir. 1993) (dictum), cert. granted, 62 U.S.L.W. 3705 (U.S. April 25, 1994) (No. 93-7927); *Tague* v. *Richards*, 3 F.3d 1133, 1140 (7th Cir. 1993); *O'Neal* v. *Morris*, 3 F.3d at 145; *Castillo* v. *Stainer*, 997 F.2d 669, 669 (9th Cir. 1993), modifying 983 F.2d 145 (9th Cir. 1992); *Cumbie* v. *Singletary*, 991 F.2d 715, 724 (11th Cir.), cert. denied, 114 S. Ct. 650 (1993). That one phrase, which does not appear to be a considered decision of the question or to affect the actual holding in *Brecht* that the error was harmless, should not be read to alter *sub silentio* a central ingredient of the *Kotteakos* analysis that the Court affirmatively adopted, nor should it be interpreted to annul the long tradition of allocating the burden of persuasion in accordance with the distinction between technical errors and errors (such as constitutional errors) that tend to affect substantial rights. See *Kokkonen* v. *Guardian Life Insurance Co. of America*, 62 U.S.L.W. 4313, 4315 (U.S. May 16, 1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend."); *U.S. National Bank of Oregon* v. *Independent Insurance Agents*, 113 S. Ct. 2173, 2186 n.11 (1993) (remark in prior opinion was "obviously not controlling, coming as it did in an opinion that did not present" the issue addressed by the remark); see also note 2, *supra*.

A more plausible construction is that the phrase "they can establish that it resulted in 'actual prejudice'" does not refer to a burden of persuasion; rather, it merely indicates that the reviewing court must find that the verdict could have been affected by the constitutional error. The application of the *Kotteakos* standard in *Brecht* supports this reading. The Court's factual analysis mirrored the traditional *Chapman* approach of inquiring whether the prosecution's evidence against the defendant was sufficiently "overwhelming" to sustain the tainted conviction, but the Court applied the "less

onerous" *Kotteakos* standard in making that determination. 113 S. Ct. at 1722-1723 ("the State's evidence of guilt was, if not overwhelming, certainly weighty"). The Court concluded as a matter of federal law that the *Doyle* error was harmless (*ibid.*), but its analysis did not reflect that it had followed its own dictum by assigning the burden of persuasion to the petitioner. See *Elder* v. *Holloway*, 114 S. Ct. 1019, 1023 (1994) (remark in prior opinion that a defendant must "show" violation of clearly established federal right did not impose a burden on defendant to cite dispositive case law; whether federal right was clearly established is for reviewing courts to determine as a matter of law).

IV. REVERSING THE HISTORIC PRINCIPLE THAT THE PROSECUTION MUST SHOW THAT NON-TECHNICAL ERRORS WERE HARMLESS WOULD UNDERMINE THE RELIABILITY OF CRIMINAL JUDGMENTS

1. The integrity of the judicial system requires courts to be especially sensitive to the danger that a criminal defendant may have been prejudiced by an error at trial. That principle holds added force when there is "the possibility that a[ ] [constitutional] error may have caused the conviction of an * * * innocent person." *Brecht*, 113 S. Ct. at 1729 (O'Connor, J., dissenting). In a criminal trial, far more is at stake than money or property rights; the defendant's freedom — and sometimes his life itself — is on the line. Therefore it is a particularly serious matter when constitutional error clouds a criminal trial. Rights such as a defendant's ability to confront all the witnesses against him or her, a public trial by an impartial jury, and due process of law go to the heart of the criminal justice system and simply cannot be equated with "technical" errors such as misspelled words in an indictment. Without an "appropriately demanding" showing by the party benefiting from the error that the error did not have an injurious effect or influence on the verdict (*Brecht*, 113 S. Ct. at 1723 (Stevens, J., concurring)), one cannot be

confident that the trial nevertheless yielded a just verdict. *Rose* v. *Clark*, 478 U.S. at 577-578 ("Without [constitutional] protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.") (citation omitted).

In cases in which the burden of persuasion actually matters, the courts are by definition in some doubt about whether a proven constitutional error had a substantial and injurious impact or influence on the trial. This Court has historically been loath to allow such doubts to be resolved in the State's favor. See, *e.g.*, *In re Winship*, 397 U.S. 358, 363, 364 (1970) (the interests at stake in a criminal case are of "immense importance" and "transcending value," so that it is "critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned"); *Addington* v. *Texas*, 441 U.S. 418, 423 (1979) (discussing necessity to "exclude as nearly as possible the likelihood of an erroneous judgment" in criminal cases because of the liberty interests at stake). To be sure, respect for and confidence in the judiciaries of the various States led this Court in *Brecht* to lower the *standard* by which one determines an error to be harmless. But it simply makes no sense for the prosecution to prevail and a conviction to stand when, even under that lowered standard, the proof is in equipoise as to whether the proven error did affect the defendant's substantial rights.

Habeas review is the last opportunity for a defendant to contest a wrongful conviction that stemmed from constitutional error. A habeas proceeding will be affected by the holding in this case only if it is already established (1) that the defendant preserved a federal constitutional claim in state court (see *Coleman* v. *Thompson*, 501 U.S. 722 (1991)); (2) that the constitutional claim was meritorious; (3) that precedent in existence at the time the defendant's conviction became final *dictated* a holding in the defendant's

favor on the federal constitutional issue (see *Gilmore* v. *Taylor*, 113 S. Ct. 2112, 2116 (1993)), and (4) that the question of prejudice from the constitutional error is sufficiently grave that the allocation of the burden of persuasion may make a difference. In those circumstances, there is no reason to turn tradition on its head by forcing the defendant — already the victim of constitutional error — to demonstrate further harm.

2. The situation presented in amicus Timothy Sherman's case illustrates the need to maintain the tradition of placing the burden on the prosecution to demonstrate that a constitutional error was harmless. Despite the complete absence of evidence of motive or direct evidence that he was the killer, Timothy Sherman was convicted of murdering his parents in their sleep with a shotgun. As the Fourth Circuit's opinion indicates, the case against him was entirely circumstantial and suffered many weaknesses. 1993 WL 433317, *2. Certain "key evidence" against Mr. Sherman was the discovery of the murder weapon in a neighborhood pine tree. That evidence, however, was equivocal at best, because there was considerable evidence — described in the Fourth Circuit's opinion (*ibid.*) — that tended to contradict the premise that Mr. Sherman would have been physically able to lodge the gun in the tree in the condition in which it was found. For this reason, both the prosecution and the defense presented extensive evidence about the physical characteristics of the pine tree and of the crime scene.

Unbeknownst to the trial court or the parties, one member of the jury decided that he needed to obtain more evidence about the tree and the neighborhood than had been presented at trial. To gain that additional evidence, the juror went "to the Sherman house and then * * * drove back the streets from the Sherman house * * * looking for a tree that was so involved in the case." 1993 WL 433317, *2. The juror visually inspected both the house and the pine tree, and other jurors have provided affidavits indicating that Miller

shared the information he learned with them. The Fourth Circuit properly recognized that the juror's escapade violated Mr. Sherman's constitutional rights. *Id.* at *3; see, *e.g.*, *Turner* v. *Louisiana*, 379 U.S. 466, 472-473 (1965).

The site visit in Mr. Sherman's case posed particularly grave dangers because the object of the juror's investigations was a central piece of evidence in the case, whose physical characteristics were hotly contested at trial. But the record cannot reflect what impressions the juror gained from his unsupervised inspection, because Maryland courts, like federal courts (see Fed. R. Evid. 606(b)), will not allow a juror's thought processes to be examined. See 1993 WL 433317, *2.

It is entirely possible in Mr. Sherman's case that the ill-gotten evidence influenced the jury's determination. Yet the rules of evidence severely hamstring his ability to *prove* that point, if it is he who must bear the burden. Thus, although we are arguing that Mr. Sherman should prevail under any standard, a court might construe the impenetrable uncertainty surrounding the impact of the site visit on the juror's deliberations to cause a failure in carrying the burden of persuasion. The risk of error is high. The proper approach to these issues dictates that the State — not the constitutionally wronged defendant — bear that risk. See *Stockton* v. *Virginia*, 852 F.2d 740, 743-744 (4th Cir. 1988) (Wilkinson, J.), cert. denied, 489 U.S. 1071 (1989).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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OTHER MATERIALS:

Blume, John H. and Garvey, Stephen P.,
Harmless Error In Federal Habeas Corpus After Brecht v. Abrahamson,
35 William and Mary L. Rev. 163 (1993) 6

Goldberg, Steven H., *Harmless Error: Constitutional Sneak Thief*, 71 J. Crim. Law & Criminology 421 (1980) 8

Goldblatt, Craig, *Harmless Error As Constitutional Common Law: Congress's Power To Reverse Arizona v. Fulminante*, 60 Univ. Chi. L. Rev. 985 (1993) 8

Liebman, James S., *Federal Habeas Corpus Practice And Procedure* (1988) 19

Webster's *New Collegiate Dictionary* (1981) 16

No. 93-7407

In the

Supreme Court of the United States

October Term, 1994

ROBERT O'NEAL,

Petitioner,

v.

FRED MCANINCH, WARDEN,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF OF THE STATES OF MARYLAND, ET AL.,[1] AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE[2]

At issue in this case is the allocation of the burden of proof to establish that trial error was harmless on habeas review of state criminal convictions under *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). The Court must clarify

[1] States joining this brief are listed on the cover and their respective counsel are listed on the inside cover.

[2] This brief is submitted by the amici states through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

whether the party bearing that burden is the state or the habeas petitioner. The answer to this question necessarily implicates the twin interests of concluded litigation and the proper scope of federal habeas review of state criminal convictions, interests of no small concern to the amici states.

Resolution of the question presented will affect not only that principle upon which the co-existence between the states and the federal courts depends, that is, the principle of organization otherwise dubbed "federalism," but also the resources of state criminal justice systems already feeling the strain engendered by collateral review of convictions. The states, of course, are the entities that bear the brunt of the costs, be they economic or social, of habeas review of state prisoner claims; hence, this amicus brief in which amici strongly urge the Court to allocate to the habeas petitioner the obligation of proving that a trial error actually prejudiced the jury verdict.

STATEMENT OF THE CASE

In 1981, Petitioner Robert O'Neal was tried by a jury in an Ohio state court and convicted of the aggravated murder, aggravated robbery, and kidnapping of Henry Podborny as part of a conspiracy. *O'Neal v. Morris*, 3 F.3d 143, 144 (6th Cir. 1993). O'Neal was sentenced to life imprisonment. After exhausting his state remedies, O'Neal sought habeas corpus relief on, *inter alia*, the grounds that the trial court's instructions allowed the jury to impute the intent to kill of other conspirators to O'Neal, in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979); and that the prosecutor's closing argument also improperly suggested that the prosecution need not make an independent showing of intent as to each defendant for conspiracy liability to attach. *O'Neal*, 3 F.3d at 145, 147. The district court granted habeas relief.

The United States Court of Appeals for the Sixth Circuit reversed. The Sixth Circuit held that petitioner's *Sandstrom* claim failed the *Boyde* test:[3] the jury instruction did not constitute trial error. *Id.* at 147. The appeals court did find error as to the prosecutor's argument, but held that error was harmless. *Id.* Citing *Brecht v. Abrahamson* for the proposition that habeas relief is not warranted unless the *habeas petitioner* establishes that federal constitutional trial error had a substantial and injurious effect or influence on the jury's verdict, the Sixth Circuit held that O'Neal failed to meet his burden of establishing actual prejudice. *Id.* at 148.

O'Neal then filed a petition for writ of certiorari with this Court, raising four issues. *See* Cert. Pet. at (i). On April 4, 1994, the Court granted review solely on question number two, the question concerning the allocation of the burden of proof for establishing harmless error.

SUMMARY OF ARGUMENT

This case presents a question left in doubt by the Court's decision in *Brecht v. Abrahamson*: whether under the *Kotteakos* standard held applicable in *Brecht*, the petitioner bears the burden of proof on habeas review to show that trial error substantially prejudiced the verdict. Amici respectfully submit that the burden of proof is properly assigned to petitioner under this standard. Amici argue: first, that the Chief Justice's opinion for the Court in *Brecht* is correct in holding that the *Kotteakos* test allocates to the petitioner the

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[3] In *Estelle v. McGuire*, 112 S. Ct. 475 (1991), the Court held that the test for error in jury instructions is that set out in *Boyde v. California*, 494 U.S. 370 (1990): "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle*, 112 S. Ct. at 482 and n.4, quoting *Boyde*, 494 U.S. at 380.

burden of proving actual prejudice in all cases where the error is amenable to harmless error analysis; second, that allocation of the burden to the petitioner on habeas, while the state retains the burden on direct review to show that the error was harmless beyond a reasonable doubt, is consistent with the well-established distinction between direct and habeas review; and third, that the plenary review mandated by *Kotteakos* safeguards the petitioner in that in no case will the burden of proof predetermine the outcome.

ARGUMENT

I. THE CHIEF JUSTICE'S OPINION FOR THE COURT IN *BRECHT* IS CORRECT IN HOLDING THAT *KOTTEAKOS* ASSIGNS THE BURDEN TO THE PETITIONER TO SHOW ACTUAL PREJUDICE.

In *Brecht v. Abrahamson*, the Chief Justice, writing for the Court, held that in federal habeas the burden of proof to establish that error was not "harmless" rests with the habeas petitioner. *Brecht*, 113 S.Ct. at 1722. The Court's opinion adopted the test for harmless error set out in *Kotteakos v. United States*, 328 U.S. 750 (1946), "under which an error requires reversal only if 'it had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 113 S.Ct. at 1718, quoting *Kotteakos*, 328 U.S. at 776. The Chief Justice's opinion for the Court clearly states that "under this standard, habeas petitioners ... are not entitled to habeas relief based on trial error *unless they can establish* that it resulted in 'actual prejudice.'" *Brecht*, 113 S.Ct. at 1722 (emphasis added). The majority of federal courts to rule on the issue have followed this express language and allocated the burden

of proof to the petitioner,[4] except the First Circuit, *see Libby v. Duval*, 19 F.3d 733, 739-40 n. 15 (1st Cir. 1994) and the Sixth Circuit, which is split on this question. In this case, the Sixth Circuit placed the burden on O'Neal, 3 F. 3d at 147; but in *Stoner v. Sowders*, 997 F.2d 209 (6th Cir. 1993), the Sixth Circuit allocated the burden of proving the error was harmless to the state. *Id.* at 213.

The minority view is based on Justice Stevens' concurrence in *Brecht*. Although Justice Stevens concurred in the Court's opinion as well as in its judgment, he wrote separately to state that he supported adoption of the *Kotteakos* standard because first, that standard requires de novo review, and second, in his view, it places the burden on the state to explain why the errors were harmless. *Brecht*, 113 S.Ct. at 1723 (Stevens, J., concurring).[5]

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[4] *Robinson v. Arvonio*, ___ F.3d ___, 1994 WL 259746 (3rd Cir. 1994); *Bibbins v. Dalsheim*, 21 F.3d 13, 16 (2d Cir. 1994); *Smith v. Dixon*, 14 F.3d 956, 975 (4th Cir. 1994) (*en banc*); *Tague v. Richards*, 3 F.3d 1133, 1140 (7th Cir. 1993); *Castillo v. Stainer*, 997 F.2d 669, 669 (9th Cir. 1993), *modifying* 983 F.2d 145 (9th Cir. 1992); *Lowery v. Collins*, 996 F.2d 770, 773 (5th Cir. 1993); *Henry v. Estelle*, 993 F.2d 1423, 1427 (9th Cir. 1993); *Cumbie v. Singletary*, 991 F.2d 715, 725 (11th Cir. 1993), *cert. denied*, 114 S.Ct. 650 (1994).

[5] Justice White's dissent in *Brecht* (joined by Justices Blackmun and Souter) views *Kotteakos* as placing the burden of proof on the petitioner. *Brecht*, 113 S.Ct. at 1727 (White, J., dissenting). Justice O'Connor's separate dissent generally suggests agreement with Justice Stevens' concurrence. *Id.* at 1731 (O'Connor, J., dissenting). Thus, different majorities of the Court in *Brecht* agreed that (1) *Kotteakos* provides the appropriate standard for habeas cases (the Chief Justice and Justices Stevens, Scalia, Kennedy and Thomas); and (2) that *Kotteakos* places the burden of proof on the petitioner (the Chief Justice and Justices Blackmun, White, Scalia, Kennedy, Souter, and Thomas).

Amici states respectfully submit that the Chief Justice's opinion for the Court in *Brecht* is correct in holding that the *Kotteakos* test places the burden on the petitioner to show that the error substantially affected the jury verdict, and Justice Stevens' concurrence is mistaken in its contrary reading of *Kotteakos* on the burden issue.[6] A careful reading of *Kotteakos* itself, and the plain language and historical meaning of the federal harmless error statute on which the *Kotteakos* test is based, compel this conclusion. Additionally, Justice Stevens' reading of *Kotteakos* and his reading of the legislative history of the federal harmless error statute rest on a distinction between "technical" and "other" potentially harmless trial error that cannot be found in the statute or in *Kotteakos* and has been repeatedly rejected by the Court's harmless error jurisprudence.

The Chief Justice's opinion for the Court in *Brecht* explains that the *Kotteakos* test is grounded in the federal harmless error statute and specifically, that *Kotteakos* equates the statutory definition of harmless error: error that does not affect the "substantial rights" of the parties -- with the standard the opinion articulates: error that does not have a "substantial and injurious effect" on the jury verdict. As the Court's opinion in *Brecht* explicitly recognizes, *Kotteakos* construed the statutory phrase "substantial rights" to mean "substantial effect on the verdict." *Brecht*, 113 S. Ct. at 1718, n. 7. In other words, it is the reliability of the jury

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[6] One law review article has suggested that the Chief Justice's opinion for the Court in *Brecht* did not properly consider the issue of burden of proof and is therefore not entitled to full weight on that issue. John H. Blume and Stephen P. Garvey, *Harmless Error In Federal Habeas Corpus After Brecht v. Abrahamson*, 35 William and Mary L. Rev. 163, 173 (1993). Given Justice Stevens' concurrence, there can be little doubt that both the majority and the dissents in *Brecht* were quite aware of the issue and that the opinions reflect the considered views of the respective Justices.

verdict, and the "rights" of both state and the defendant ("the parties") to a reliable verdict, that are the proper focus of harmless error analysis, not the specific constitutionally-guaranteed right of the defendant allegedly infringed by trial error. Similarly, 'substantial" rights refers to the magnitude of the effect of the error on the reliability of the outcome, not to the "importance" of the specific Bill of Rights guarantee (or statutory protection) infringed by the alleged error.

This reading of *Kotteakos* is fully supported by the express language of that case. Justice Rutledge's eloquent opinion for the Court paraphrases the federal harmless error rule that the Court adopts as follows: "It comes down on its face to a very plain admonition: Do not be technical, where technicality does not really hurt the party whose *rights in the trial and in its outcome* the technicality affects." 328 U.S. at 760 (emphasis added). This language reads the statutory phrase "substantial rights" as referring to the parties' rights in the reliability of the verdict and accordingly holds that the statutory definition of harmless error: error which does not affect the "substantial rights" of the parties -- means error which does not substantially prejudice the reliability of the result.

In the very next sentence, *Kotteakos* goes on to note first, that the legislative history of the statute supports its plain language in defining "harmless error" as only that error which does not "affect the parties' substantial rights" -- i.e. does not substantially prejudice the reliability of the verdict; second, that there remains a limited category of error to which the statute and harmless error analysis do not apply; and third, that the burden of showing that error is not harmless, if harmless error analysis applies at all, rests with the defendant.

"[T]he purpose of the bill ...was... to ...'cast upon the party seeking a new trial the burden of showing that any technical errors he may complain of have affected his substantial rights, otherwise they are to be disregarded.' H.R. Rep. No. 913, 65th Cong. 3d Sess. 1. But that this burden does not extend to all errors appears from the statement which follows immediately. 'The proposed legislation affects only technical errors. If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights [in the verdict], the burden of sustaining the verdict will notwithstanding this legislation rest upon the one who claims under it.'" *Ibid.*

Kotteakos at 760.[7]

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[7] *Kotteakos* supports its analysis by tracing the origins of the harmless error doctrine. *Id.* at 758-63. The doctrine was developed in the context of direct review. Its history began in England. The doctrine was created in response to the Exchequer Rule. Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. Crim. Law & Criminology 421, 422 (1980). *See also* Craig Goldblatt, *Harmless Error As Constitutional Common Law: Congress's Power To Reverse Arizona v. Fulminante*, 60 Univ. Chi. L. Rev. 985, 993-94 (1993). Under that rule, errors which occurred during the trial were held presumptively prejudicial and cause for reversal. *Id.*

The rule resulted in much overcrowding in the English courts; litigation seemed to survive until the parties expired. Goldberg, *supra* at 422. The English then created a harmless error rule for civil litigation which prevented reversal absent substantial wrong. *Id.* The Exchequer Rule was eventually imported to the United States and as a consequence, the American courts became hostage to the same backlog and delay in cases experienced by the English courts. *Id.* Despite this detrimental effect on litigation, the American courts persisted in applying the Exchequer Rule, no matter how insignificant the error. *Id.* As the *Kotteakos* Court explained, the courts became "impregnable citadels of technicality." 328

Justice Stevens' concurrence in *Brecht* cites this last-quoted passage from *Kotteakos* for the contrary proposition: that *Kotteakos* imposes the burden of proof on the state to show that trial error is harmless unless the specific right allegedly infringed by trial error is "merely technical." *Brecht*, 113 S. Ct. at 1723-24 (Stevens, J. concurring).[8] This interpretation, which focuses on a distinction between types of constitutional or statutory rights and corresponding varieties of harmless error analysis is not faithful to the plain language of *Kotteakos* and the statute, nor does it comport with the historical meaning or the logic of these authorities.

As noted, the passage quoted by Justice Stevens follows immediately after Justice Rutledge's paraphrase of the harmless error statute: "do not be technical - don't reverse convictions where the error doesn't substantially affect the verdict." That context makes clear that Justice Stevens is misguided in relying on the word "technical" in the 1919 statute to create two types of harmless error analysis. Rather,

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U.S. at 759.

Lawyers were not at all shy about purposely planting error in the record as a means of redressing a losing verdict. Goldberg, *supra* at 422. Criminal trials in particular fell victim to such tactics. *Kotteakos*, 328 U.S. at 759. Finally, many members of the bar, some judges, and legal scholars were moved to seek remedial legislation which resulted in "harmless error" legislation in nearly all jurisdictions. *Ibid* and n. 12, *see also* Goldberg, *supra*, at 422. Congress enacted a federal harmless error statute in 1919. *Act of February 26*, 1919 c. 48, 40 Stat. 1181, *see Kotteakos*, 328 U.S. at 758. The statute commanded federal appellate courts to ignore errors that did not "affect the substantial rights of the parties." 28 U.S.C. § 391 (1925-26 ed.), Congress reenacted the harmless error rule as 28 U.S.C. § 2111 in 1949, "tinkering with the language" but leaving the meaning intact. *Brecht*, 113 S. Ct. at 1718, n. 7.

[8] Justice Stevens categorizes constitutional rights as "never technical." *Brecht*, 113 S. Ct. at 1723-24.

"technical" is shorthand for the conclusion that the error does not warrant reversal.

The historical background of the key phrases further clarifies that the *Kotteakos* test provides only one harmless error analysis for all potentially harmless error, and it places the burden on the petitioner. In his concurring opinion in *United States v. Lane*, 474 U.S. 438 (1986) Justice Brennan explained the historical background of the key statutory phrase from which the *Kotteakos* test is derived.

> Reference to whether error "affected the substantial rights of the parties" was not invented by Congress in 1919. The phrase was commonly used by courts throughout the 19th century . . . [A]s used by these courts, error which "affected the substantial rights of the parties" was generally understood to refer, not to errors respecting a particular class of rights, but rather to any error which affected the fairness of the trial as a whole by calling into question the reliability of the result. [citations omitted]

Lane, 474 U.S. at 455-56.

Justice Brennan goes on to discuss the legislative history of the statutory harmless error rule, noting that Congress likewise intended a focus on the effect of the error on the reliability of the outcome, and not segregation of different classes of trial error for different harmless error analysis. *Id.* at 457-58. Indeed, Congress later deleted the obsolete (and in the present day confusing) word "technical" from the harmless error statute without changing the meaning of the statute, nor does this change affect the *Kotteakos* test. *See Lane*, 474 U.S. at 459; *Brecht*, 113 S.Ct. at 1718, n.7.

Justice Brennan concludes that consistent with this statutory interpretation, *Kotteakos* derives from the statute a single harmless error test, which focuses on the outcome, and does not distinguish between "technical" and "substantial" guarantees.

> In *Kotteakos*, we expressly rejected the argument that the 1919 Act required a determination of what are only technical, what substantial rights; and what really affects the latter hurtfully . . . . We held instead that the Act's command to disregard errors unless they 'affect the substantial rights of the parties' was a command not to overturn a conviction unless, after examining the record as a whole, the court concludes that the error may have had substantial influence on the outcome of the proceeding.

Lane at 458-59.

In summary, the statute and *Kotteakos* subject all error amenable to harmless-error analysis to one test: has the petitioner shown that the error substantially affected the verdict. Neither the statute nor *Kotteakos* distinguishes between "merely technical" error that may or may not be harmless but which places the burden of proof on the petitioner, and some other sort of error that may or may not be harmless but which places the burden of proof on the state, as Justice Stevens would have it.

Moreover, the Court's recent harmless error jurisprudence generally disfavors an approach which categorizes the allegedly infringed Constitutional or statutory guarantee, and applies different rules to each subcategory, in favor of an approach which asks the reviewing court to focus

on the effect of the error on the verdict. In *Chapman v. California*, 386 U.S. 18 (1967), the Court set a standard higher than the federal statute or the *Kotteakos* test for direct review of constitutional error, placing the burden on the state to show "beyond a reasonable doubt" that the error did not affect the verdict. *Id.* at 24. But the Court again rejected a bright-line rule that all constitutional violations require reversal, and instead focused on the effect of the error on the outcome of the trial. *Chapman*, 386 U.S. at 22-23. Similarly, in *Lane*, 474 U.S. at 446, the Court applied the *Kotteakos* test -- did the error substantially affect the verdict -- to errors involving misjoinder raised on direct review. The *Lane* Court rejected the approach of Justice Stevens in that case advocating categorization of rights to determine whether to conduct harmless error analysis and if so, what analysis to conduct. *Lane*, 474 U.S. at 448 n.11 and 449. *See also id.* at 458-59 (Brennan, J., concurring in part and dissenting in part).

Of course, the Court has also consistently recognized that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman*, 386 U.S. at 567. In other words, the "natural effect [of error as to these rights] is to prejudice a litigant's substantial rights" in the verdict. *Kotteakos*, 328 U.S. at 760. But the Court has consistently resisted allowing the exception to swallow the rule: only those constitutional deprivations that are "structural defects in the constitution of the trial mechanism" have been held not amenable to harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 286 (1991) (opinion of the Chief Justice, Part II, for the Court). As the

Court's limited grant of review recognizes, this case presents no such issue.[9]

In summary, amici states maintain that *Kotteakos* imposes the burden of proof on the petitioner and that the opinion of the Chief Justice for the Court in *Brecht* was therefore correct in adopting this burden of proof as part of the *Kotteakos* standard. The contrary reading urged by Justice Stevens' concurrence in *Brecht* is not consistent with either the language or the structure of the federal harmless error statute (either the old or the new version). Nor is it supported by the *Kotteakos* opinion itself or by this Court's subsequent jurisprudence on the issue, because it depends on a distinction between "technical" and "nontechnical" potentially harmless error rejected by these decisions. Amici urge this Court to clarify that the *Kotteakos* standard adopted by the Court in *Brecht* places the burden on the petitioner to show that the error substantially affected the jury verdict as a condition for obtaining habeas relief.

II. THE NATURE OF COLLATERAL REVIEW DICTATES THAT THE BURDEN OF PROVING ACTUAL PREJUDICE SHOULD FALL ON THE HABEAS PETITIONER.

That habeas corpus is not intended to function as a surrogate for direct review is a simple enough proposition. It is a proposition that nonetheless provides the proper focus for

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[9] The error identified by the Sixth Circuit -- misleading prosecutorial argument -- cannot rise to this level because it is only argument - not an error in the evidence or in the law presented to the jury. As noted, petitioner's *Sandstrom* claim was rejected by the Sixth Circuit on the basis that the jury instructions were not error under *Boyde*, but in any event, such claims have also been held amenable to harmless error analysis. *Sullivan v. Louisiana*, __ U.S. __ 113 S. Ct. 2078, 2082 (1993).

determining the allocation of the burden of proof for establishing that trial error of constitutional dimension was or was not harmful.

A. Collateral And Direct Review Serve Distinct Functions.

In *Brecht*, the court's adoption of the *Kotteakos* standard over the *Chapman* standard[10] was predicated on the notion that the former test:

> is ... better tailored to the nature and purpose of collateral review, and more likely to promote the considerations underlying our recent habeas cases.

Brecht, 113 S. Ct. at 1722.

The conclusion that the allocation of the burden of proof for demonstrating harmless error on direct review does not apply on habeas review is likewise deducible from the differences between direct and collateral review. As early as 1947, this Court made clear that the two modes of review are not mirror images. *See Sunal v. Large*, 332 U.S. 174, 178 (1947) (writ of habeas corpus will not be allowed to do service for an appeal). That principle has been echoed over and again, most recently in *Brecht*. 113 S.Ct. at 1712. *See also Wright v. West*, 112 S.Ct. 2482, 2490 (1992) (opinion of

[10] Until the issue was squarely presented in *Brecht*, it was assumed that *Chapman* applied to federal habeas cases. *See, e.g., Yates v. Evatt*, 500 U.S. 391, 404-05 (1991); *Rose v. Clark*, 478 U.S. 570, 579-80 (1986); *Milton v. Wainwright*, 407 U.S. 371, 378 (1972); *Anderson v. Nelson*, 390 U.S. 523, 525 (1968) (per curiam). *See also* John H. Blume & Stephen P. Garvey, *supra* n. 5 at 163. As noted, *Chapman* places the burden of proving harmless error on the state on direct review.

Thomas, J.); *Teague v. Lane*, 489 U.S. 288, 306 (1989) (opinion of O'Connor, J.); *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987); *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J., dissenting in part and concurring in judgments in part).

As this Court explained in *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983), direct review is the channel for challenging a conviction. Once that process comes to closure, a presumption of not only finality but correctness attaches to the conviction and sentence. *Brecht*, 113 S.Ct. at 1719; *Barefoot*, 463 U.S. at 887. It is this presumptively correct and final conviction at which the state prisoner strikes on collateral habeas review. Therefore, the role of habeas corpus is secondary and limited; it is not a forum to relitigate state trials. *Id.*[11]

[11] In conducting habeas review, a federal court is limited to deciding whether a conviction was obtained in violation of the federal Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254; *Estelle v. McGuire*, 112 S. Ct. 475, 479 (1991); *Rose v. Hodges*, 423 U.S. 19, 21 (1975) (per curiam). Violations of state law and procedure which do not infringe specific federal constitutional protections are not cognizable under Section 2254(a). *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). And federal review is further limited: where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his or her trial. *Stone v. Powell*, 428 U.S. 465, 494 (1976). Other rules requiring the exhaustion of all available state remedies and eliminating claims procedurally defaulted in state court limit the claims cognizable on habeas. *See, e.g., Reed v. Farley*, 62 U.S.L.W. 4564 (1994) (defendant's failure to object to violation of time limitation for trial pursuant to Interstate Agreement on Detainer renders claim non-cognizable on federal habeas review); *Rose v. Lundy*, 455 U.S. 509, 515 (1982) (petition containing unexhausted claims mandates dismissal of entire petition or deletion of unexhausted claim). *See also Wainwright v. Sykes*, 433 U.S. 72, 81 (1977) (adequate and independent finding by state court of procedural default will bar federal habeas review of federal claim unless

Put in the simplest of terms, the difference between collateral and direct review lies in the fact that the latter mode of review is concerned with reexamining the *judgment* of conviction. *Barefoot*, 463 U.S. at 887. This is not the case in habeas. *Coleman v. Thompson*, 501 U.S. 722, 738 (1991). When a federal court reviews a state prisoner's habeas corpus petition pursuant to 28 U.S.C. § 2254, the court does not revisit the question of the petitioner's guilt or innocence; rather, the court determines whether the petitioner is "in custody in violation of the Constitution, or laws, or treaties of the United States." *Jackson v. Virginia*, 443 U.S. 307, 332 n. 5 (1979) (Stevens, J., concurring in judgment). This shift in focus is predicated upon the presumption of correctness that attaches to the conviction once the direct review process is completed.[12]

It follows from the fact that the state conviction has been upheld as presumptively correct, that the burden of rebutting that presumption should be shouldered by the habeas petitioner. Otherwise, the presumption of correctness is rendered meaningless. The presumption has effect only if the habeas petitioner bears the burden of proving that an error of constitutional magnitude resulted in his being actually prejudiced.

That the difference between direct review and collateral review betokens the application of different rules is not a

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habeas petitioner can show cause for default and consequent prejudice).

[12] A presumption is defined as a legal inference as to the existence or truth of a fact not certainly known that is drawn from the known or proved existence of some other fact. Webster's *New Collegiate Dictionary* at 904 (1981). *See also Mullaney v. Wilbur*, 421 U.S. 684, 703 n. 31 (1975) (describing a presumption as procedural device requiring trier of fact to conclude the existence of one fact from proved existence of other facts).

proposition alien to this Court. The Court need look no further than its decision in *Brecht* for an example that the difference between the two modes of review dictate whether a rule governing direct review will also govern collateral review. The Court's decision not to extend the *Chapman* standard to habeas cases was rooted in its history of distinguishing between direct and collateral review. 113 S.Ct. at 1720.

Similarly, in *Teague v. Lane*, 489 U.S. at 305-10 (1989) (opinion of O'Connor, J.), the Court held that new constitutional rules of criminal procedure will seldom have retroactive application to criminal cases on federal habeas, although new rules always have such application to criminal cases on direct review. *See Griffith v. Kentucky*, 479 U.S. 314, 320-28 (1987). Likewise, in *Pennsylvania v. Finley*, 481 U.S. at 555-56, the Court held that there is no right to counsel on collateral review, even though the Constitution guarantees the right to counsel on direct appeal. *See Douglas v. California*, 372 U.S. 353, 355 (1963). In *United States v. Frady*, 456 U.S. 152 (1982), the Court again crafted, on collateral review, a rule different from the one applied on direct review. The Court held that while the federal plain error rule applies in determining whether a defendant may raise a claim for the first time on direct appeal, the "cause and prejudice" standard applies in determining whether that same claim may be raised on habeas. *Id.* at 162-69. In this case also, the notion that different rules should apply on direct and collateral review justifies placing upon the habeas petitioner the onus of proving that a trial error was harmful.

Conversely, the net effect that would result from having the state bear the burden of proof in establishing that trial error resulted in no actual prejudice to the state prisoner on both collateral and direct review is to sanction that which was deplored in *Frady*, 456 U.S. at 164, namely, treating the

two modes of review as one and the same. Moreover, allocating the burden of proof to the state on both direct and collateral review is tantamount to a proclamation that the state must prove anew the validity or correctness of the state prisoner's conviction. This is precisely why it is fitting that on collateral review, the state prisoner bear the burden of proving that an error of constitutional magnitude resulted in his being actually prejudiced.

This Court has not hesitated in placing the burden on the habeas petitioner in analogous federal habeas contexts. For example, in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the Court placed the burden on the habeas petitioner to show prejudice as a necessary element of a claim of ineffective assistance of counsel. A habeas petitioner must also show prejudice for procedurally defaulting a claim in state court "even in cases in which the alleged constitutional error impaired the truthfinding function of the trial." *Coleman v. Thompson*, 501 U.S. at 739. Likewise, the habeas petitioner must show prejudice with respect to successive claims or claims not previously raised which constitute an abuse of the writ. *Sawyer v. Whitley*, 112 S.Ct. 2514, 2521 (1992); *McClesky v. Zant*, 499 U.S. 467, 491 (1991). There is no good reason why the burden should not be allocated to the habeas petitioner on the issue of whether constitutional trial error substantially and injuriously affected the jury's verdict.

B. The Historic Meaning Of Habeas Corpus And The Principles Of Federalism And Comity Make The Case For Allocating To The Habeas Petitioner The Burden Of Proof On The Issue Of Harmless Error.

Yet another reason counsels in favor of allocating to the habeas petitioner the burden of proving that a trial error

substantially and injuriously influenced the jury's verdict. Allocation of the burden to the habeas petitioner is fully congruent with the historic purpose for which the writ of habeas corpus is made available. The Great Writ is an extraordinary remedy that serves "to guard against extreme malfunctions in the state criminal justice system." *Wright v. West*, 112 S. Ct. at 2490; *Kuhlman v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion); *Engle v. Isaac*, 456 U.S. 107, 126 (1982).

The writ's "historic function" is to provide relief in those rare cases where "there are meritorious causes in which habeas corpus is the ultimate and only relief and designed to be such."[13] *Brown v. Allen*, 344 U.S. 443, 501 (1953). *See, e.g., Rose v. Mitchell*, 443 U.S. 545, 559 (1979) (habeas relief granted where discrimination in selection of grand jury established); *Brewer v. Williams*, 430 U.S. 387, 404-06 (1977) (habeas relief granted where police interrogated petitioner and elicited incriminating statements from him in violation of the Sixth Amendment right to counsel); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1962) (writ granted where indigent petitioner was denied right to counsel at his state trial). Given that the writ is a unique and exceptional remedy reserved for those persons whom society has grievously wronged, *Fay v. Noia*, 372 U.S. 391, 440-41 (1963), and given that the state prisoner's conviction has been deemed valid on direct review,

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[13] Although triggered by criminal prosecutions, the writ is denominated a civil remedy. James S. Liebman, *Federal Habeas Corpus Practice And Procedure* § 2.1 at 3 (1988). The nature of the writ as a prisoner-initiated civil remedy informed by equitable principles, *id.*, is an additional reason to charge the habeas petitioner with the responsibility of proving that a trial error was harmful. Traditionally, in civil proceedings the party bringing the complaint bears the burden of proving injury entitling him or her to the grant of the relief requested. No different rule should apply here.

it stands to reason that on collateral review the burden of proving harmful error should rest with the habeas petitioner.

Beyond that, imposing the burden of proving harmless error on the state on collateral review would ignore important interests that it is this Court's tradition to honor. An animating concern in the Court's habeas jurisprudence has been to ensure that the principles of comity and federalism are respected. *See Brecht*, 113 S. Ct. at 1720. The Court stated in *Teague*, 489 U.S. at 308, that the interests in comity and finality must be considered in determining the proper scope of habeas review. It is undisputed that habeas review potentially undermines the state's significant interest in concluded litigation. *See McClesky*, 499 U.S. at 491; *Harris v. Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting). Moreover, undue federal intrusion into state criminal trials frustrates both the states' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. *Engle*, 456 U.S. at 128. Forcing the state, on both direct and collateral review, to shoulder the burden of proving that a trial error of constitutional dimension was harmless converts collateral review into yet another round of direct review. More importantly, such a rule is incredibly intrusive, for it forces the state to prove anew the validity of a state conviction that has already survived the cold glare of direct review. Faithful adherence to the imperatives of federalism, comity and the historic purpose of the Great Writ, dictates that the burden of proving harmful trial error rest with the habeas petitioner.

Ignoring the principles of federalism and comity would have a practical impact on the states as well. These costs far outweigh the benefit petitioner argues may be derived from a rule under which the burden of establishing harmless error is allocated to the state. It is no secret that habeas review may cost society the right to punish admitted offenders because

retrial is often difficult, if not impossible, due to the passage of time, erosion of memory, and dispersion of witnesses. *Engle*, 456 U.S. at 128. That the state should not be forced to gather forgetful witnesses and moldering evidence for a second trial at every drop of the habeas hat is a legitimate concern. This is no less of a concern in the context of the burden allocation for proving that a trial error was or was not harmless.

As this Court pointed out in *Brecht*, 113 S. Ct. at 1721, there is no statute of limitations governing federal habeas. The habeas petitioner controls the timing of habeas litigation. The longer he waits to bring a claim, the more difficult it becomes for the state to defend against the claim. Conversely, putting the burden of proof on the habeas petitioner forces the petitioner to bring his claim in a more timely fashion. If the petitioner bears the burden of proof, it will be to his advantage to bring his claims as promptly as possible. Such a rule would also help to slam the door on the filing of frivolous claims. Federal courts, like state courts, must be concerned with husbanding judicial resources. Allocating to the habeas petitioner the burden of proof with respect to demonstrating that a trial error was harmful will do much to stem the tide of frivolous prisoner petitions that is sure to result if a contrary rule is adopted.

While some might argue that having the state bear the burden on both direct and collateral review encourages the state's adherence to constitutional rules and procedures, that argument was rejected in *Brecht*, 113 S. Ct. at 1721. It should likewise be rejected here. It simply defies logic to suggest that prosecutors and state courts alike will intentionally flout federal constitutional dictates because they know that the state will not have to prove that a trial error resulted in no actual prejudice to the state prisoner on collateral review. A more than adequate incentive to obey

federal constitutional rules, if any is needed, flows from the threat that the conviction may not pass muster on direct review -- and, as noted below, from the plenary review available on habeas. In sum, the nature of collateral review, the purpose of habeas corpus, and the principles of federalism and comity, as well as common sense, dictate that the habeas petitioner bear the burden of proving that a trial error created a substantial and injurious effect on the jury's verdict sufficient to warrant the grant of habeas relief.

III. THE PLENARY REVIEW MANDATED BY *KOTTEAKOS* ENSURES A FAIR DETERMINATION OF ACTUAL PREJUDICE.

Application of the harmless error doctrine on either direct or collateral review demands that a reviewing court engage in the task of examining the entire record of the criminal trial to determine whether a constitutional error prejudiced the trial's outcome. *Yates v. Evatt*, 500 U.S. 391, 404-05 (1991). This is the practice in direct review cases under *Chapman*, *see Chapman*, 386 U.S. at 56 (Harlan, J., dissenting), and, as Justice Stevens emphasized in *Brecht*, the *Kotteakos* harmless error analysis also requires the federal courts on collateral review to review the entire trial record de novo to decide whether the constitutional error did or did not substantially and injuriously influence or affect the jury's verdict. 113 S. Ct. at 1724. The Court's opinion in *Brecht* conducts such de novo review, see *id.* at 1722-23. *See also id.*, at 1731 (O'Connor, J., dissenting) (observing that federal courts, on collateral review, must conduct review of entire trial record de novo in undertaking harmless error analysis).

As Justice Stevens explained:

> The purpose of reviewing the entire record is, of course, to consider all the ways that an error can infect the course of a trial.

Brecht, 113 S. Ct. at 1724. By virtue of the fact that under the *Kotteakos* standard, just as under the standard in *Chapman*, the federal courts review the state trial record de novo in conducting a harmless error analysis, the courts retain the discretion to make of that record what they will. At each level of review the federal court is free to reach a conclusion on the effect of the constitutional error that is different from the determination reached by the state courts. What this means in terms of the burden allocation issue is that the allocation, while important, will not automatically and necessarily be determinative of whether habeas relief will be granted. The burden allocation becomes one factor of several to consider in this calculus.

Bearing out this contention are *Henry v. Estelle*, 993 F.2d 1423, 1425-27 (9th Cir. 1993) and *Cumbie v. Singletary*, 991 F.2d 715, 724-25 (11th Cir. 1993), two cases where the federal courts of appeal, citing to *Brecht*, allocated to the habeas petitioner the burden of proving that a constitutional trial error was harmful. In both cases the courts nonetheless concluded, after a de novo review of the state criminal trial record, that the error was not harmless and that habeas relief was warranted. Given that the burden allocation will not be dispositive of the question of whether the constitutional error was sufficiently harmful to warrant habeas relief, it is consistent with the equitable concerns underlying habeas review to impose upon the petitioner the burden of proving that the trial error was harmful.

CONCLUSION

For the reasons stated above, the judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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